UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

HOOD RIVER DISTILLERS, INC.

and Cases 19–CA–260013
19–CA–265595
TEAMSTERS LOCAL UNION NO. 670 19–CA–267920
19–CA–268290
and 19–CA–264083

BOARD OF TRUSTEES OF THE OREGON PROCESSORS EMPLOYEES TRUST FUND

HOOD RIVER DISTILLERS, INC. (Employer)

and Case 19–RD–271944

DAVID COONTZ, an Individual (Petitioner)

and

TEAMSTERS LOCAL UNION NO. 670 (Union)

Irene Hartzell Botero and *Sarah Ingebritsen, Esqs.*,
for the General Counsel.
Dennis Westlind and *Jessica Osborne, Esqs.*,
for the Respondent/Employer.
Noah Barish, Esq.,
for the Charging Party/Union (Teamsters Local Union No. 670).
Noelle Dwarzski, Esq.,
for the Charging Party (Board of Trustees).
David Coontz, pro se,
for the Petitioner.

DECISION

GEOFFREY CARTER, Administrative Law Judge. The General Counsel asserts that in 2020, Hood River Distillers (Respondent) violated the National Labor Relations Act (the Act) by unilaterally changing employee terms and conditions of employment without the consent of the Teamsters Local Union No. 670 (Union) and without bargaining to a good-faith impasse. In addition, the General Counsel asserts that when 25 bargaining unit members went on strike, Respondent unlawfully discharged them and/or failed to immediately reinstate them after the strikers made an unconditional offer to return to work. For the reasons explained below, I have

found that Respondent committed most of the alleged violations in the complaint (I found two of the unilateral changes to be lawful).

In Case 19–RD–271944, I have recommended that the Regional Director dismiss a January 2021 decertification petition because Respondent's unfair labor practices, in 2020, have a causal relationship to the employee disaffection. I have also recommended that the Regional Director sustain the Union's ballot challenges and overrule those of Hood River Distillers.

STATEMENT OF THE CASE

This case was tried by videoconference on 11 days between May 24 and June 21, 2021.[1] The Teamsters Local Union No. 670 (Union) and the Board of Trustees of the Oregon Processors Employees Trust Fund (Trust) filed the unfair labor practice charges in this case on the following dates:

Case	Filing Date
19–CA–260013	May 6, 2020 (filed by the Union)
19–CA–264083	August 4, 2020 (filed by the Trust)
19–CA–265595	September 2, 2020 (filed by the Union)
19–CA–267920	October 21, 2020 (filed by the Union)
19–CA–268290	October 29, 2020 (filed by the Union).

On May 4, 2021, the General Counsel issued a third amended consolidated complaint in which it alleged that Respondent violated Section 8(a)(5) and (1) of the Act by, since on or about May 1, 2020, and in the absence of consent or a valid impasse, failing to continue in effect the terms of and conditions of the expired collective-bargaining agreement by: (a) failing and/or refusing to pay bargaining unit employees the wage rates established in the expired collective-bargaining agreement; (b) giving itself the ability to limit contributions to the bargaining unit employees' pension plan; (c) failing and/or refusing to make contributions to bargaining unit employees' health and welfare plan managed by the Trust; (d) limiting the Union's right to access Respondent's facility; and (e) failing and/or refusing to continue its dues-checkoff practice. The General Counsel also alleged that Respondent violated Section 8(a)(1) of the Act by making two statements in June/July 2020 that it permanently replaced employees who went on an unfair labor practice strike that began on about May 6, 2020. Last, the General Counsel alleged that Respondent violated Section 8(a)(3) and (1) of the Act by: failing and refusing to reinstate 25 unfair labor practice strikers to their former positions since about August 31, 2020 (or, alternatively, since about June 30 and/or July 30, 2020, when Respondent made the statements that it permanently replaced the strikers); and discharging two strikers on September 1, 2020, because of their union and protected concerted activities. Respondent filed a timely answer denying the alleged violations in the third amended consolidated complaint.

Also, on May 4, 2021, the Regional Director issued an order consolidating the "CA" cases noted above with Case 19–RD–271944. In Case 19–RD–271944, the Union objected to

[1] Trial proceedings took place on the following dates: May 24, 26–28, 2021; and June 1–2, 7–8, 14–15, 21, 2021. None of the parties objected to litigating the trial by videoconference. (Tr. 9.)

conduct affecting a mail ballot election (conducted in 2021), contending that Respondent committed unfair labor practices that had a causal connection to the employee disaffection. In addition, Respondent and the Union challenged a total of 27 ballots cast in the election, a number that is sufficient to affect the results of the election. Since the factual issues in the "RD" case relate to those in the CA cases, the Regional Director consolidated the CA and RD cases for the purpose of a hearing.

A. Proposed Amendments to the Complaint

On the first day of trial (May 24, 2021), I granted the General Counsel's request to amend the consolidated complaint. In the amendment, the General Counsel further alleged that Respondent violated Section 8(a)(5) and (1) of the Act by failing to continue in effect the terms and conditions of the expired collective-bargaining agreement in the absence of consent or a valid impasse by: since on or after May 6, 2020, changing entry level and probationary pay rates established in the expired collective-bargaining agreement; since or about December 24, 2020, changing paid holidays established in the expired collective-bargaining agreement; and since on or about January 1, 2021, changing its compensated time off policy established in the expired collective-bargaining agreement. My decision to permit the amendment came with two caveats: first, that the General Counsel would delay presenting witness testimony about the new allegations to allow time for Respondent to prepare its defense for those claims; and second, that Respondent retained the right to argue that the new allegations were not closely related to a timely filed unfair labor practice charge. (Tr. 12–14.)

On June 14, 2021, I denied the General Counsel's request to further amend the complaint to allege that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally eliminating the janitor position and "Bracket 1" positions without the Union's consent and in the absence of a good-faith impasse. I explained that since the General Counsel had rested its case in chief and Respondent had begun presenting its defense, it would raise due process issues to add new allegations for Respondent to address in its defense. (Tr. 1856–1860; see also GC Rejected Exh. 1(ee) (June 14, 2021 proposed amendments).)

The General Counsel has requested that I reconsider my ruling on the proposed June 14, 2021 complaint amendments. In support of that request, the General Counsel maintains that the proposed amendments could not have taken Respondent by surprise because the issues came to light through the testimony of one of Respondent's witnesses (human resources manager Janene Sumerfield), the General Counsel proposed the amendments on the next hearing date after Sumerfield testified, and the matter was fully litigated based on Sumerfield's testimony. (GC Posttrial Br. at 99–100.)

After considering the parties' arguments and the applicable legal authorities, I stand by my decision to deny the proposed June 14, 2021 amendments to the complaint on due process grounds. Under Board Rule 102.17, a judge has wide discretion to grant or deny motions to amend complaints. In determining whether that discretion has been properly exercised, the Board evaluates (1) whether there was surprise or lack of notice, (2) whether there was a valid excuse for the delay in moving to amend, and (3) whether the matter was fully litigated. *Rogan Bros. Sanitation, Inc.*, 362 NLRB 547, 549 fn. 8 (2015), enfd. 651 Fed. Appx. 34 (2d Cir. 2016). Here, there was no notice to Respondent about the proposed amendments until after Respondent

began its defense to the General Counsel's case in chief. The June 14, 2021 proposed amendments were a surprise, as the General Counsel had already rested by that point, thereby establishing what appeared to be the scope of allegations against Respondent. As for the delay in moving to amend, the General Counsel suggests that the Union did not know of the alleged unilateral changes to the janitor position and Bracket 1 positions until Sumerfield testified. That argument has some merit as to the Bracket 1 positions but does not as to the janitor position since Respondent previously asserted in Case 19–RD–271944 that it eliminated that position (see, e.g., Charging Party Union (CPU) Exh. 11 (p. 3) (Hood River Distiller's April 29, 2021 position statement regarding challenged voters).) Finally, the alleged unilateral changes were not fully litigated. Given the timing of the proposed amendments, Respondent did not have an opportunity to investigate those allegations or prepare possible defenses thereto (such as whether the changes were consistent with established past practice). Consistent with these factors, I found that it would deny Respondent due process in this case if I required it to defend against the additional allegations in the proposed June 14, 2021 amendment.[2]

B. Respondent's Motion to Dismiss

On February 25, 2021, Respondent filed a Motion to Dismiss the Complaint Due to the General Counsel's Inability to Prosecute (Motion to Dismiss). In its motion, Respondent maintained that the President did not have the authority to terminate General Counsel Peter Robb on January 20, 2021, and also did not have the authority to replace him with (then) Acting General Counsel Peter Sung Ohr. Because of those alleged problems, Respondent asserted that Acting General Counsel Ohr lacked the authority to prosecute this case. On April 30, 2021, the General Counsel filed a response in opposition to Respondent's Motion to Dismiss.

On May 26, 2021, I denied Respondent's Motion to Dismiss. Relying on the Board's decision in *National Association of Broadcast Employees & Technicians – the Broadcasting & Cable Television Workers Sector of the CWA, AFL–CIO, Local 51 (NABET)*, 370 NLRB No. 114 (2021), I found that even if the Board has jurisdiction to review the President's removal of the former General Counsel, it would not effectuate the policies of the Act for the Board to exercise that jurisdiction. (Tr. 134–135.) I stand by that ruling.[3]

[2] The Union, of course, can still pursue the allegations in the June 14, 2021 proposed amendment by filing an unfair labor practice charge, making whatever arguments are appropriate about timeliness, and proceeding through the customary process. I also note that I am not finding that a complaint can never be amended after the General Counsel rests its case in chief. I only find, in my discretion, that the June 14, 2021 proposed amendment was not appropriate in this case because of due process concerns.

[3] In its posttrial brief, the General Counsel contended that I should rule on the merits of whether the President properly removed General Counsel Robb from his position. (See GC Posttrial Br. at 140–142.) I decline the General Counsel's request since I am bound to follow the Board's decision in *NABET*, 370 NLRB No. 114. For the same reason, I also take no position on the merits of General Counsel Jennifer Abruzzo's September 22, 2021 ratification of Acting General Counsel Ohr's prosecution of the complaint in this case before she was sworn in as General Counsel.

On the entire record,[4] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Union and Respondent, I make the following

FINDINGS OF FACT[5]

I. JURISDICTION

Respondent, a corporation with a place of business in Hood River, Oregon, has been engaged in the business of distilling, bottling and distributing spirits. During the 12–month period ending May 4, 2021, Respondent derived gross revenues in excess of $500,000 and purchased and received at its facility goods valued in excess of $50,000 directly from points located outside the State of Oregon. Respondent admits, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent also admits, and I find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Since 1934, Respondent has been in the business of distilling, bottling, and distributing various spirits such as bourbon, whiskey, vodka and rum. Respondent's blending/bottling facility and warehouse are located in Hood River, Oregon. (Tr. 1317–1318, 1592–1593; see also R. Exh. 3 (pp. 6, 15).)

For several years, Respondent has recognized the Union as the sole collective-bargaining representative of the following bargaining unit at Respondent's production/warehouse facility in Hood River:

> All employees, excluding office and clerical employees, casual employees hired for no more than thirty (30) calendar days and supervisors as defined in the Labor Management Relations Act.

(GC Exh. 2 (Art. 1, Sec. 1).) Consistent with that recognition, Respondent and the Union have executed successive collective-bargaining agreements, the most recent of which was effective from March 1, 2015, through February 28, 2019. Respondent generally has around 25 employees in bargaining unit positions. (GC Exh. 2; Tr. 50–51, 336, 1318, 1335; see also Tr. 178, 2300–2301 (noting that before 2019, the Union and Respondent bargained amicably and agreed to successor contracts after only a few bargaining sessions).)

---

[4] The transcripts in this case generally are accurate, but to the extent that I identified transcript corrections during my review of the record, I have noted those corrections in Appendix B to this decision.

[5] Although I have included several citations in this decision to highlight particular testimony or exhibits in the evidentiary record, I emphasize that my findings and conclusions are not based solely on those specific citations, but rather are based on my review and consideration of the entire record for this case.

B. 2018: Respondent Sells its Top Selling-Brand

In 2018, Respondent sold its best-selling brand/portfolio, Pendleton Whisky, to Proximo Spirits. In connection with the sale, Respondent paid a share of the profits to its shareholders and also paid bonuses to its employees, including employees in the bargaining unit. Since the Pendleton Whisky portfolio accounted for 70 percent of Respondent's gross income, Respondent laid off several employees, reducing its total complement of full-time employees from around 107–110 to around 70–72. With the support of its Board of Directors as well as funding, Respondent subsequently developed a plan to create and build new brands with a goal of becoming profitable again by 2023. (Tr. 1323–1327, 1706–1708, 1714, 1926–1930, 1988–1990; R. Exh. 3 (p. 1); see also Tr. 1324, 1990, 1927 (noting that Proximo Spirits also owns the Jose Cuervo brand), 1327, 2307 (noting that much of the bargaining unit avoided layoffs because Respondent, in connection with the sale, signed an agreement with Proximo to continue bottling Pendleton Whisky for at least 3 years, and potentially for up to 15 years).)

C. December 4, 2018: The Union Requests Bargaining for a Successor Collective-Bargaining Agreement

On December 4, 2018, the Union sent a letter to Respondent to provide notice that the Union wished to open the collective-bargaining agreement to review and amend all articles and terms. The Union noted that any proposed agreement with Respondent that arose from negotiations would have to be reviewed and approved by the International Brotherhood of Teamsters' Brewery and Soft Drink Conference (Teamsters International) before being submitted to the bargaining unit for ratification (though the Union's bargaining team still had the authority to reach an agreement at the bargaining table). On January 9, 2019, Respondent sent a letter accepting the Union's notification. (Tr. 337–338, 543–545, 1336–1338, 1715; GC Exhs. 5(b)–(c).)

D. February 27–28, 2019: The First Two Bargaining Sessions

At the start of bargaining on February 27, 2019, the Union (through business agent Larry Kale) passed a proposal that called for enhanced wages and benefits. Working from the expiring collective-bargaining agreement, the Union proposed (among other changes) that Respondent: increase the shift differential for swing or second shift work from $0.50 to $1 per hour; add 5 compensated days off annually for all regular employees; and increase all wage rates by 6 percent in each year of the proposed 3–year agreement. (GC Exh. 6; Tr. 47–49, 55–60, 178–182, 1341–1342, 1347–1348, 1350.)

Respondent, primarily represented by Janene Sumerfield (human resources manager), Erica Mitchell (chief financial officer) and Donna Gaudreault (operations manager), had a different perspective. Since Respondent expected to be unprofitable as a result of the Pendleton Whisky portfolio sale, Respondent hoped to negotiate cost savings in the successor collective-bargaining agreement (though Respondent was not claiming an inability to pay for certain employee benefits). With its cost-cutting goal in mind, Respondent proposed, among other changes, that the Union accept: changes to health benefits such that either bargaining unit employees would be responsible for any future increases in the costs of health care benefits

under the Oregon Processors Employees Trust Fund (OPET) plan *or* join the health benefit plan that Respondent provided to nonunion employees; changes to health benefit eligibility such that regular employees would need to work more than 120 hours per month to be eligible for insurance coverage (instead of 80 hours per month as specified in the expiring agreement); and language that would permit Respondent to change the matching contributions in the company's 401(k) plan at any time in Respondent's discretion. Respondent did not propose any wage increases that would apply to the entire bargaining unit, explaining that it was seeking a wage freeze. (GC Exhs. 7–8; Tr. 55, 63–64, 67–68, 183–190, 304–305, 308, 318, 1328–1329, 1341, 1351–1352, 1355–1356, 1361–1362, 1719–1721, 1930–1935, 2018–2019, 2302–2303; see also R. Exh. 3 (p. 18) (Respondent's newsletter, containing a summary of bargaining on February 27, 2019);[6] GC Exhs. 2 (Art. 6, Sec. 1) (expiring agreement language regarding health insurance coverage under the OPET plan), 9(a)–(b) (Cigna health plan summary of benefits that Respondent provided in response to the Union's request for information about the health insurance that Respondent provided to nonunion employees); Tr. 71–72, 1364–1365, 1380–1381, 1721–1722, 1936 (noting that the Union requested information about Respondent's Cigna health care plan for nonunion employees, and also noting that Respondent indicated that it might be changing health care plan providers after a bidding process).)

On February 28, 2019, the Union provided a second proposal to Respondent. In its second proposal, the Union reduced its proposed wage increases to 4 percent in the first contract year, and 3 percent in both the second and third contract years. The proposal also noted several tentative agreements that the parties reached on nonsubstantive contract language, as well as a tentative agreement that the shift differential for swing or second shift work would be $0.75 per hour (though the parties were not yet in agreement on the time of day the shift differential would begin). Kale also advised Respondent that the Union planned to have a third party do a comparison between the current OPET health insurance that bargaining unit members had and the Cigna health insurance that Respondent was proposing. (GC Exh. 10; Tr. 73–77, 150, 195, 197, 201–202, 303, 1367–1369.)

E. March – May 2019: Communications Before Next Bargaining Session

1. Communications about Respondent's Cigna health care plan

In Mid–March 2019, Kale contacted Sumerfield to request additional information about Respondent's health care plan for the comparison to OPET. After exchanging a few letters to clarify what information the Union sought, Sumerfield provided Kale with information about (among other things) the premiums/costs that Respondent paid for the Cigna plan, Respondent's Medical Expense Reimbursement Program (MERP), and the short and long term disability coverage included with the Cigna plan. Kale in turn provided information to Sumerfield in response to questions that she asked about OPET. (GC Exhs. 11–15, 17; Tr. 79–90, 195–196, 204–211, 1381–1388, 1756–1757; see also GC Exh. 12 (explaining that if an employee pays at least $2000 towards their insurance deductible in a given year, MERP will reimburse the employee up to $1650 for eligible expenses; MERP will pay an additional $500 if the employee reaches the $2500 maximum deductible).)

[6] Respondent issued its newsletter in about April 2019. (Tr. 1927–1928.)

In a meeting in late March 2019, bargaining unit members indicated to Kale that they opposed moving from OPET to Respondent's Cigna health insurance plan. Kale subsequently, in about early April 2019, received the third party comparison between the two plans. (Tr. 91–92, 211–213, 300; GC Exh. 16.)

2. Communications about scheduling next bargaining dates

Also in mid–March 2019, Respondent (through Sumerfield) proposed that the parties schedule dates for their next bargaining session. Initially, Respondent suggested dates in April and early May. Kale indicated that he would get back to Sumerfield about his availability, but then did not do so until May 1, when he indicated that Respondent was not available until mid–June. Ultimately, the parties agreed to schedule bargaining for June 24–25, 2019, in part because the Union needed dates that would work for secretary/treasurer Michael Beranbaum, who planned to participate in the next bargaining sessions. After learning that Beranbaum would be attending bargaining as part of the Union's negotiating team, Respondent arranged to have its attorney, Kristen Bremer Moore, also attend the upcoming sessions. (GC Exhs. 12–13, 17–18, 20–23, 25–26; Tr. 86, 96–99, 214–224, 229–230, 548–549, 1388–1394; see also Tr. 297–298, 313–314 (noting that Kale and Beranbaum needed to travel from Salem, Oregon to attend bargaining in Hood River, Oregon, a distance of approximately 100 miles).)

F. June 24–25, 2019: Third and Fourth Bargaining Sessions

In the June 24, 2019 bargaining session, Respondent began by making a presentation about its financial situation after the Pendleton Whisky portfolio sale and its 5-year plan to return to profitability. To support its requests for contract concessions in wages, health care benefits, and other areas, Respondent also presented charts indicating that Respondent expected to lose money in the next few years, and that Respondent was paying higher wage rates than employers in the Hood River area with comparable jobs. Beranbaum, who was now serving as the Union's spokesperson and adopted a more adversarial tone, expressed skepticism about Respondent's presentation and asserted that he could not rely on the reports that Respondent provided without seeing the underlying documentation. Beranbaum also asked if Respondent was asserting an inability to pay higher wages and benefits, to which Respondent answered that it was not making that claim. (Tr. 103–104, 230–232, 295–297, 340–345, 547, 549, 1394–1401, 1937–1942, 2021–2023, 2025, 2117, 2279–2280, 2290, 2304–2307; R. Exhs. 19, 128–129; see also Tr. 2023–2024 (noting that in a sidebar discussion with Bremer Moore, Beranbaum complained about Respondent's bargaining team and asserted that the team lacked experience with bargaining).)

After taking a caucus, the Union made a third contract proposal. For compensated time off, the Union dropped its proposal to increase the number of days off for all employees, and instead proposed that Respondent offer 10 annual days off for employees with 1 to 3 years of experience (under the expired agreement, employees with those levels of experience received 5–8 days off annually). The Union also proposed wage increases of 2.5 percent in each year of the 3–year contract, with the first increase retroactive to March 1, 2019. (GC Exh. 27; Tr. 104–106, 232–235, 345–349, 1401–1406.)

In the morning on June 25, 2019, Respondent presented a new contract proposal to the Union. For health insurance, Respondent offered to continue with OPET on the condition that if

OPET rates increased, Respondent and bargaining unit employees would each be responsible for half of the amount of the increase. For the 401(k) plan, Respondent proposed language stating that Respondent would provide matching contributions as defined in the company's plan summary document. Respondent continued to seek a wage freeze but offered to agree to 10 annual days off for employees with 1 to 3 years of experience if the Union agreed to delete contract language related to time off that accrued for certain employees in connection with plant shutdowns for maintenance. And, Respondent proposed language that would allow it to require employees to perform general labor work (Bracket 4 work) as needed.[7] (GC Exh. 28; Tr. 107–108, 236–245, 351–360, 1406–1417, 1724–1726; see also Tr. 354–356 (noting that Respondent was also interested in reducing the matching contribution that it provided to employees under the 401(k) plan).)

After a caucus, the Union offered its first "what-if" proposal (a proposal that the Union offered as a package deal while reserving its right to revert to its last proposal if Respondent declined the "what-if" offer). The primary features of the what-if proposal were: (a) employees would keep OPET for their health insurance, with Respondent paying all costs; (b) employees would accept a wage freeze for the duration of the 3–year contract (running from March 1, 2019 to February 28, 2022); (c) Respondent would provide a 230-percent match to employee contributions to the 401(k) plan, up to a maximum of 4.347 percent of the employee's annual gross earnings;[8] and (d) a health insurance benefit for certain employees who retired between ages 62 and 65 would cease to be available to employees who retired on or after February 28, 2022. (GC Exh. 29; Tr. 108–110, 245–248, 365–374, 385–386, 553–554, 1028–1029, 1067, 1417–1421, 1726–1727, 1944–1945, 2025–2027, 2117–2118.)

After considering Respondent's verbal feedback and counteroffers, the Union presented a new "what if" proposal that retained many of the features of the previous "what if" proposal but included the following language about Bracket 4 work:

> The Company agrees that employees hired to work in a different Bracket may volunteer to perform work, as needed, in the Bracket 4 position. If the company does not receive a sufficient number of volunteers to perform the needed work the Company may force, in reverse seniority order, Seasonal employees first. If additional employees are still needed the Company may force Regular employees in inverse seniority order. Work performed in a Bracket 4 position shall be paid at the Bracket 4 rate.

(GC Exh. 30 (Schedule A); Tr. 112, 388, 391, 1728.) The Union also lowered the percentage of lost wages that employees would receive if they missed work time due to illness or off the job injury ("time loss payments"). (GC Exh. 30 (Art. 12); Tr. 113, 387–388, 391, 1421–1423, 1727–1728.)

[7] Bracket 4 work has a lower hourly rate than other job classifications. Under the expired collective-bargaining agreement, Respondent could only ask employees to volunteer to do Bracket 4 work while being paid at the lower hourly rate (e.g., if a senior blender volunteered to do Bracket 4 work for 3 hours, that employee would only be paid the Bracket 4 hourly rate for those 3 hours instead of their usual/higher hourly rate). (GC Exh. 2 (Schedule A); Tr. 244, 249–251, 360, 386–388, 551, 554.)

[8] Through this formula, Respondent matched employee contributions to the 401(k) plan up to a cap of approximately 10 percent of the employee's annual gross earnings. (Tr. 389.)

Respondent's negotiating team indicated that the Union's latest "what-if" proposal was a positive development but explained that it needed to show the proposal to Respondent's Board of Directors. The parties concluded bargaining for the day, with the Union having the impression that the parties had a deal unless the Board took issue with the matching percentage for employee contributions to the 401(k) plan.[9] (Tr. 113–116, 254–255, 326–327, 387, 391–392, 394–395, 559, 561, 1028–1029, 1047, 1067–1068, 1094, 1423–1424, 1731–1732, 1946, 1995, 2027–2029, 2032.)

G. July 22, 2019: Respondent Rejects the Union's What-If Proposal

On about July 17, 2019, Respondent's bargaining team communicated with Ron Dodge, Respondent's president and also one of the three members of Respondent's board of directors. After speaking with Dodge about the what-if proposal, Respondent's bargaining team understood that Respondent's board of directors would not approve the proposal in part because Respondent preferred to have concessions that would give it more control over health care plan costs (but might be willing to offer a small wage increase). (Tr. 1426–1427, 1946–1947, 1995–1996, 2030–2031, 2121–2123, 2131–2132.)

On July 22, 2019, Sumerfield emailed the Union to advise that Respondent would not be accepting the Union's what-if proposal. Sumerfield proposed scheduling bargaining dates in August "to continue negotiations and the progress we've made so far." (GC Exh. 31; Tr. 117, 257–258, 393, 562–563, 1427–1429, 1947–1948, 2121; see also R. Exh. 26 (July 31 email in which Respondent suggested alternative dates for bargaining in August).) Beranbaum responded to the news by contacting Bremer Moore, but in a July 24, 2019 email Bremer Moore stated that Beranbaum should communicate with Sumerfield and Mitchell because they were leading the bargaining for Respondent. Beranbaum reiterated his request to talk with Bremer Moore because he believed Sumerfield's email was "going to create a huge problem," but Bremer Moore did not reply further. (GC Exh. 32; Tr. 394–395, 564, 1430, 2031–2032.)

H. August/September 2019: Communications and Developments before the Next Bargaining Session

1. Union updates bargaining unit about status of bargaining and seeks preliminary authorization for a strike

On August 7, 2019, the Union met with bargaining unit members to provide an update on the status of bargaining for a successor collective-bargaining agreement. The Union also held an initial strike authorization vote to begin the process of obtaining approval from Teamsters International to call a strike if the Union and its members deemed it necessary. A majority of

[9] The Union maintains that Respondent's negotiating team promised to recommend the what-if proposal to the Board, but Respondent denies that it made such a promise. (Tr. 113–115, 255, 391–392, 561, 1068, 1425–1426, 1732, 1946, 2029–2030, 2120–2121.) I have credited Respondent's testimony on this point (that it did not promise to recommend the proposal) because this dispute appears to arise out of a misunderstanding during bargaining. Further, the parties did not document a tentative agreement about the what-if proposal, and the Union did not assert that Respondent was legally obligated to execute a contract based on the what-if proposal (after Respondent notified the Union that it was rejecting the what-if proposal). (See Tr. 1429–1430, 2029–2030.)

bargaining unit members voted in favor of authorizing a strike. (Tr. 258–261, 397–399, 701–702, 841–843; see also Tr. 398–399 (noting that strike approval from Teamsters International would enable strikers to receive strike benefits).)

Later in August, Respondent posted a flyer about ongoing bargaining and how a strike might impact employees who decided to participate. Among other things, the flyer stated that (a) employees may be temporarily or permanently replaced by another worker and placed on a recall list for when positions open; and (b) Respondent would not terminate or retaliate against employees for exercising their rights to strike. (Tr. 1446–1448; R. Exh. 150.)

2. August 16, 2019: Union access dispute

On the topic of union access to the facility, the expired collective-bargaining agreement states that "[r]epresentatives of the Local Union shall be admitted to the Company's plant upon notification to the plant office." (GC Exh. 2 (Art. 1, Sec. 4).) The parties agree that union representatives need to comply with any generally applicable safety guidelines (such as wearing safety glasses) when they visit the production area of the facility.[10] (Tr. 266, 870, 1432–1433, 1436–1437.)

On August 16, 2019, Kale came to visit Respondent's facility, along with Marcus Williams, who had just started working as a business agent for the Union. Kale and Williams checked in with an employee at the front desk, received badges, and then went to the break room where they met with employee and shop steward Michelle Leonard (who had been notified by radio that Williams and Kale were present for a visit). Leonard then showed Kale and Williams the production area of the facility, which provided Williams an opportunity to say hello to employees who were working in the area and distribute business cards. (Tr. 118–121, 261, 263–264, 697–700, 843–850, 1071–1072; see also GC Exh. 38 (Union's August 22, 2019 letter to Respondent introducing Williams as the business agent who would be handling the contract with Respondent); Tr. 395–396.)

Towards the end of their 15–20 minute visit, Gaudreault approached Williams and Kale and objected to the fact that Williams was not wearing safety glasses (Kale was wearing his own eyeglasses) and did not have a manager escorting them. Kale stated that it slipped his mind that Williams needed to have safety glasses and apologized for that oversight. Kale and Williams

[10] Respondent asserts that a member of management or their designee must escort all visitors if they enter the production or warehouse areas of the facility (with the manager stepping back to a reasonable distance if a union representative is visiting and needs to speak privately with an employee). I do not find that the professed rule about escorting visitors to be an established past practice when union representatives visited the facility because the evidentiary record does not show that it was followed consistently. (Compare Tr. 119–121, 123–124, 155–158, 261–265, 1068–1070, 1073, 1096–1097 and R. Exh. 29 (pp. 1–2) (union representatives signed in at the front desk and visited the production and warehouse areas of the facility without a management escort) with Tr. 1070, 1073, 1096–1097, 1432–1434, 2307–2309, 2372–2373 and R. Exh. 29 (p. 1) (union representatives escorted by management or designee when visiting the production and warehouse areas); see also R. Exh. 132 (p. 1) (Respondent's "Security Plan," issued on February 17, 2014, stating that all visitors must sign in, wear a visitor badge and be accompanied while in the facility); Tr. 1435–1436, 1821–1822 (discussing R. Exh. 132, but raising questions about whether the Union and Respondent bargained over the security plan).)

then left the production facility to go the warehouse, where they met with employee and shop steward Joshua Harbert. Meanwhile, plant manager Jake Williams told Leonard that she should not take visitors to the production floor. (Tr. 121–123, 265, 850–851, 1030, 1073–1074, 1098, 2309–2310.)

On August 19, 2019, Sumerfield sent a letter to the Union about Kale's and Williams' August 16 visit. Sumerfield stated as follows in her letter:

> It was brought to my attention that you arrived at our plant facility, Friday, August 16th, without an advance announcement and then proceeded to interrupt an employee's job duties in order to meet with her in our break room and while she was on company time; you then entered our production area without a manager's escort as per our policy, distracted employees from their work while on the production floor to 'meet and greet' and distribute business cards, and disregarded the requirement to wear safety glasses while on the production floor.
>
> As seasoned union representatives, we expect more professionalism and knowledge of basic manufacturing safety guideline[s] and labor union rules from you. It is highly offensive that you would take such liberties with Hood River Distillers and its employees. In accordance with our labor agreement and past practice, Hood River Distillers will only allow union representatives to meet with employees under the following conditions:
>
> - Notification to the Plant Office upon arrival, if not sooner
> - Access is limited to non-production, public space
> - It is on employees' non-work time (employee's break, preceding or following the work day)
> - All company and manufacturing policies and guidelines are complied with
>
> Any violation of these reasonable and professional expectations will not be tolerated. In addition, any employee who violates these rules is subject to disciplinary action. Please do not put our employees in jeopardy.

(GC Exh. 35; see also Tr. 124–126, 1438.) The Union (through Williams) responded that its authorized agents "will continue to perform visits in the same fashion that we have done historically." (GC Exh. 36 (also noting that the Union was available to resume bargaining on September 23, 24, 26 and 27); Tr. 851–853, 1438–1440; see also R. Exh. 29 (additional August 2019 emails in which the Union and Respondent disagreed about the parameters that apply when union representatives visit the facility); Tr. 1440–1442; GC Exh. 37 (noting that the parties agreed to meet for bargaining on September 27 but could not agree on any of the other dates that the Union and/or Respondent proposed for September or early October).)

3. September 19, 2019: Respondent raises concerns about employees being pressured to support a strike

On September 19, 2019, Sumerfield sent a letter to the Union to express its concern that union representatives "threatened union members that they will lose their jobs with Hood River Distillers if they do not vote to strike or cross a picket line." Respondent demanded that the

Union stop "harassing, threatening, coercing and providing false information to our employees." (R. Exh. 30; Tr. 1443–1445, 1735–1736.)

In a reply letter dated September 23, 2019, Beranbaum agreed that "all members should be free from Harassment in their workplace." Beranbaum asked Respondent to provide any evidence or documentation showing improper behavior and stated that if Respondent failed to provide any such evidence then the Union would consider the harassment allegations to be without merit. Respondent subsequently declined to identify the names of any employees who complained of harassment. (R. Exh. 31; Tr. 1445–1446, 1823–1824.)

I. September 27, 2019: Fifth Bargaining Session

At the start of the September 27, 2019 bargaining session, Respondent presented another proposal to the Union.[11] Among the significant elements in the proposal, Respondent proposed: (a) that effective January 1, 2020, all regular bargaining unit employees move from the OPET health insurance plan to the health insurance plan that Respondent provided to its nonbargaining unit employees, with Respondent paying all costs (seasonal employees would be covered by a plan comparable to the seasonal employee OPET plan under the Affordable Care Act); (b) eliminating the time loss benefit since Respondent believed that employees would receive a similar benefit under the health insurance plan that Respondent was offering; (c) 1-percent wage increases in the second and third years of the contract; and (d) that, in light of the dispute about Kale's and Williams' August 2019 visit to the facility, union representatives would have access to Respondent's facility if they provided at least 24 hours advance notice and would only be allowed in nonproduction, public areas unless accompanied by a member of management. Respondent also renewed its proposal that the contract provisions about the 401(k) plan simply state that employees could contribute to the plan and that Respondent would provide matching contributions in an amount defined by the plan. (GC Exhs. 40 (Arts. 1, 6–8 and Schedule A); Tr. 137–141, 144, 269–274, 329–330, 400–401, 566–569, 571, 622, 705, 1449–1453, 1736–1743, 1825, 1893, 1949–1950, 1996–1997, 2123–2124, 2314–2319.)

Upon reviewing Respondent's proposal, the Union noted that the proposal did not identify some of the areas where the parties had previously reached tentative agreements.[12] Based on that observation and some of the other aspects of the proposal (such as the proposal to place employees in Respondent's health care plan), the Union asserted that Respondent was engaging in regressive bargaining. Respondent denied that allegation, but after a back and forth, Respondent requested a brief caucus to review its proposal. After the caucus, Respondent returned with a one-page summary of the key elements of its "final" proposal. Respondent also noted that Blue Cross Blue Shield would now be administering its health insurance plan and provided a benefit summary of the plan (with virtually the same benefits, in Respondent's view). Beranbaum objected that Respondent was suggesting even more changes to benefits and asserted

[11] Bremer Moore did not attend the September 27 bargaining session, in large part because Respondent's negotiating team wanted to avoid the "distraction" of having Beranbaum seeking to communicate with Bremer Moore in sidebars instead of speaking directly to the other members of Respondent's negotiating team. (Tr. 399, 1450.)

[12] For example, Respondent omitted tentative agreements that the parties had previously reached in paragraphs about the grievance procedure, the amount of the shift differential, and Respondent's successors. (Compare GC Exh. 28 (Arts. 9, 11 and 14) with GC Exh. 40 (same).)

that the Union would need more documentation about the new plan to compare it to the OPET plan. (GC Exhs. 41 (noting that Respondent would continue to match employee 401(k) contributions at current rates), 42; Tr. 138, 141–143, 275–277, 283, 328, 402–403, 411–414, 418, 572–574, 706, 1453–1461, 1722, 1743–1746, 1751–1752, 1766, 1825–1828, 1950–1954, 1997–2000, 2005, 2313, 2374–2375.)

Next, the parties took another caucus. During the caucus, Respondent attempted to correct the errors in the proposal that it presented at the start of the session. Initially, Respondent worked in Gaudreault's office, which was next to the conference room where the parties were meeting for bargaining. Later, Respondent's team moved to another office in a different part of the facility. The Union, meanwhile, decided that it could not bargain further that day because it needed more information about the health care plan and because it remained concerned that Respondent was bargaining regressively. Finding Gaudreault's office empty, the Union told an employee at the front desk that they were leaving for the day. Respondent, meanwhile, was not aware that the Union had departed until Respondent learned that the shop stewards who were on the Union's bargaining team (Leonard and Harbert) had resumed working their assigned shifts. (Tr. 412, 414–415, 574–575, 1461–1463, 1747–1748, 1954–1956, 2005–2006, 2126, 2319–2321, 2324, 2374.)

In the early afternoon, Respondent emailed the Union a revised copy of the proposal that Respondent offered in the morning (the proposals generally remained the same, but areas of tentative agreement were noted more accurately). Respondent provided the following explanation in its email:

> It was not our intention to engage in regressive bargaining practices. We looked back and found that we had not used the most recent TA'd version [of the contract] due to a laptop glitch. We apologize for any inconvenience. We look forward to your response. We will provide you the Seasonal [employee] benefit document as soon as we are able. We will provide Josh and Michele with the attached version.

(GC Exh. 43; Tr. 145–146, 280–281, 415–416, 576–578, 1463–1468, 1748–1751, 1894, 1955–1956, 2321–2323.)

J. October 2019 through February 2020: Communications and Developments before the Next Bargaining Session

1. Health care plan comparison

On October 3, Sumerfield provided the Union with some information about the health care plan that Respondent offered to seasonal employees. Beranbaum responded that he would provide the information to the third party administrator who would be comparing the health care plans. When Sumerfield contacted Beranbaum the next day to ask about scheduling another bargaining session, Beranbaum replied that the Union would contact Respondent about bargaining dates once the health care plan comparisons were completed. To the extent that the administrator needed additional information beyond what Sumerfield provided in this timeframe, Beranbaum relied on the administrator to request that information directly from Respondent. The evidentiary record does not show that the administrator requested additional information

about Respondent's health care plan. (GC Exhs. 45–47; Tr. 419–424, 574, 623–625, 1470–1473, 1487–1488, 1758; see also GC Exh. 48 (noting that Sumerfield contacted Beranbaum again on October 24 to schedule bargaining dates because she believed the comparison was completed, but Beranbaum advised that he was still awaiting the comparison); Tr. 424–425, 626–630, 1473–1474.)

2. November 2019: Respondent communicates a final offer and asserts impasse

On November 1, Sumerfield sent a letter to the Union about the status of negotiations. Respondent, who hoped to prompt the Union to accept its last offer or commit to additional bargaining dates, asserted as follows in the letter:

> We've allowed 5 weeks, which is a reasonable amount of time, for your review and comparison of our health benefits to the [benefits under OPET]. We have been very forthcoming with negotiation dates throughout the bargaining process. We desire to finalize the contract as soon as possible. Therefore, to avoid further delay in reaching a signed agreement, the Company, by this letter, represents to you that our last presented offer on September 27, 2019 (via email) is the Company's last and final offer. Please respond no later than November 13, 2019, whether the union accepts or rejects this offer.

(GC Exh. 49; see also Tr. 425–427, 630–633, 1475–1478.)

When November 13 passed without a response from the Union, Sumerfield sent another letter to the Union that stated as follows:

> This follows our letter of November 1, 2019, expressing Hood River Distiller's last and final offer that includes improvements to the contract that were discussed in negotiations. It was our hope that the union would present this offer to its members and that the union would move to ratify the contract. We requested the union to respond to our last and final offer no later than November 13, 2019. Having heard nothing from the union as of that date, Hood River Distillers understands the union's silence as a rejection of the company's offer. Therefore, the parties are at an impasse and HRD intends to implement the last and final effective January 1, 2020.

(GC Exh. 50; see also Tr. 427, 633–636, 1478–1480, 1758–1760, 1894–1895.)

Beranbaum responded to Sumerfield's letters on November 15, staking out the following position on Respondent's last and final offer and declaration of impasse:

> I am in receipt of your letter dated November 14, 2019 claiming the parties are at impasse and threatening to implement your last offer effective January 1, 2020. Let me first make it very clear to you, the Union categorically denies your claim that the parties are at impasse, the Union has told you on numerous occasions, since our last bargaining session that we are having information you provided . . . relating to your new Health and Welfare proposal analyzed by our medical plans 3rd party administrator and once we receive it we will schedule dates to continue negotiations. Your rhetoric and tone are not conducive to reaching agreement but to the contrary designed to lead to a dispute that would not be

> helpful to the long-term survival of the company. If you attempt to implement the offer the Union reserves its right to take any and all legal action and/or economic action to protect the integrity of the collective-bargaining process. . . .

(GC Exh. 51; see also Tr. 427–429, 636–638, 689, 1480–1482, 1761.)

Following Beranbaum's letter, Sumerfield indicated on November 18 that Respondent disagreed with the Union's position but proposed scheduling bargaining dates in early December. On November 21, the Union reiterated that it would contact Respondent about bargaining dates after the Union completed its due diligence about the proposed health care plan and discussed it with the bargaining unit to gain their perspective. The Union subsequently received the health care plan comparison (for regular employees) on November 27. (GC Exhs. 52–54; see also Tr. 429–435, 638–643, 1482–1485, 1754–1756.)

3. December 2019 through early January 2020: Respondent reasserts impasse, but parties later agree on dates to resume bargaining

On December 11, Sumerfield emailed the Union to (again) assert "that an impasse exists based on the last and final offer [Respondent] provided . . . on November 1, 2019 and the union's refusal to bargain despite repeated requests by the company." Sumerfield stated that Respondent would implement its last and final offer on January 1, 2020. (GC Exh. 55; Tr. 436–437, 644–646, 1485–1489, 1761; see also Tr. 646–647 (noting that Respondent would have to pay higher OPET premiums on and after January 1, 2020 if bargaining unit employees remained in that plan).)

In a December 17 letter, Beranbaum disputed the claim that the parties were at impasse and noted that it had received the health care plan comparison from its third-party administrator and was "in the process of scheduling and holding meetings with the members to determine if they are open to a proposal which includes a change in Health and Welfare coverage." Citing holidays, vacations and other scheduled negotiations, Beranbaum indicated that the Union would not be able to meet for bargaining before the end of the calendar year and accordingly asked about Respondent's availability in January and February 2020. (GC Exh. 56; Tr. 438–439, 647–650, 1489–1491, 1836–1837.)

Instead of implementing its final offer, Respondent stated that it would give the Union the benefit of the doubt and meet for additional bargaining. After communicating further about potential bargaining dates, the Union and Respondent agreed to schedule bargaining on January 16 and 31, 2020 (after the Union met with bargaining unit members on January 6 to review and discuss the health care plan comparison). (GC Exhs. 57–58, 60; Tr. 440–441, 445–446, 651–654, 1491–1496, 1837–1838; see also Tr. 436, 441–442, 446, 652 (noting that Beranbaum also had less availability because of a death in his family in late December 2019, and duties related to managing the estate of the deceased family member).)

4. January 6, 2020: The Union meets with bargaining unit members to discuss Respondent's proposed health care plan

On January 6, 2020, the Union held a meeting to update bargaining unit members about ongoing negotiations with Respondent for a successor collective-bargaining agreement. Among other topics, union representatives discussed the comparison between the OPET health insurance and the health care plan that Respondent proposed for the bargaining unit. (GC Exh. 59; Tr. 442, 653–654.)

5. Bargaining sessions on January 16 and 30 are canceled; next bargaining session scheduled for March 10

Due to a winter storm that prevented Kale and Beranbaum (and also Bremer Moore) from getting to Hood River, the parties were not able to meet for bargaining on January 16. The parties also had to cancel bargaining on January 31 because Mitchell was recovering from a recent surgery and therefore was unavailable. After some discussion, the parties scheduled their next bargaining session for March 10. Sumerfield suggested that the parties bargain with the assistance of a Federal Mediation and Conciliation Service (FMCS) mediator because it appeared that the parties "may be at loggerheads," but Beranbaum responded that he did not necessarily agree with Sumerfield's characterization of bargaining and did not think that a mediator would be appropriate for the March 10 session. (GC Exhs. 61–64, 65 (p. 1), 67–68; R. Exh. 50 (p. 2–3); Tr. 446–454, 464–467, 655–662, 1496–1500, 1508–1511, 1895–1896, 1957, 2036–2038.)

Also in this January/February 2020 time period, the Union provided a copy of the health care plan comparison to Respondent (in response to a request). Sumerfield replied with some corrections and updates "to more accurately reflect our insurance plan's coverage." Respondent also provided the Union with a copy of a memorandum that Respondent posted at the facility to describe the differences between the OPET health insurance and Respondent's health insurance. (GC Exh. 65–66; R. Exhs. 50 (pp. 1, 4–8), 56; Tr. 454–459, 462–463, 1497, 1500–1507, 1765–1766.)

K. March 10, 2020: Sixth Bargaining Session

On March 10, Bremer Moore began the bargaining session by presenting the essentially same offer that Respondent emailed on September 27, 2019, except that: (a) employees would be covered by Respondent's health care plan effective May 1, 2020 (instead of January 1, 2020); and (b) the 1-percent wage increase for 2020 would take effect upon ratification (instead of on March 1, 2020). (GC Exh. 69; Tr. 467–474, 662–663, 665, 1513–1518, 2036, 2039–2043; see also Tr. 473, 1515–1516, 2382 (noting that the May 1 date coincided with the open enrollment timeframe in April and the start of the new insurance plan year for Respondent's health insurance plan).)

After a caucus, the Union noted that it was returning to its most recent proposal before the "what-if" proposals in June 2019. Working from that starting point, the Union proposed (among other items) that: (a) when visiting the facility, union representatives would notify the plant office, sign in as required and wear personal protective equipment (PPE); (b) employees continue to be covered under the OPET health insurance plan; (c) the agreement specify the formula that Respondent would follow when matching employee contributions to the 401(k) plan; and (d) Respondent provide wage increases of 2.25 percent for each year of the contract,

retroactive to March 1, 2019. (GC Exh. 70 (Arts. 1, 6–8, Schedule A); Tr. 475–485, 668–670, 1518–1521, 1958–1959, 2043–2045.)

After reviewing the Union's offer during another caucus, Respondent expressed its disappointment that the offer did not accomplish what Respondent needed. Respondent then presented another proposal that was similar to what it presented at the start of the session on key issues like health care and wages, except that for union access Respondent deleted the 24–hour notice requirement that it previously sought for union representative visits. (GC Exh. 71 (Art. 1); Tr. 485–494, 670–673, 707–708, 1521–1523, 1959–1960, 2045–2047 (noting that Respondent also accepted various housekeeping changes, as well as the Union's renewed proposal that would permit Respondent to require bargaining unit employees to do Bracket 4 work in order of seniority).)

Towards the end of the bargaining session (and after a long caucus), the Union presented another proposal. For union access to the facility, the Union proposed that union representatives notify the plant office, sign in as required, wear all proper PPE, and follow all published safety and health policies and procedures (i.e., if Respondent had a policy that applied to all visitors then the union representatives would comply with that policy). On health care and wage increases, the Union presented the following two options:

> Option 1: employees who work or earn at least 80 hours in the previous month will be covered under the OPET health insurance plan; employees will receive time loss benefits; and employees accept a wage freeze for the 3–year contract; or
>
> Option 2: starting on May 1, 2020, employees who work or earn at least 80 hours in the previous month will be covered under Respondent's health insurance plan, with Respondent paying 100 percent of insurance premiums; time loss benefits are eliminated; and employees receive 2 percent wage increases in each year of the contract, retroactive to March 1, 2019.

The Union added that if Respondent preferred Option 2, the Union wanted employees to receive credit for any health care expenses that applied to their deductibles and out of pocket maximums in 2020 (e.g., if an employee paid $350 towards their deductible under the OPET plan before May 1, 2020, the employee would get credit for that $350 towards the deductible under Respondent's health care plan). (GC Exhs. 72 (Arts. 1, 6–7, 12, Schedule A), 73; Tr. 494–503, 505–506, 673–676, 707–708, 723–724, 884–885, 910, 1523–1528, 1767–1773, 1960–1962, 2006–2007, 2039, 2047–2051, 2129–2130; see also GC Exh. 87 (p. 5) (noting that although the parties were far apart on wages, Respondent "was grateful for the Union's apparent willingness to show flexibility on health insurance and believed that an agreement was within reach").)

L. Mid–March 2020: Covid–19 Pandemic

On March 12, in response to the Covid–19 pandemic, the Governor of Oregon (Governor) prohibited gatherings of 250 or more people and announced a statewide closure of Oregon K–12 schools from March 16–31, 2020. Five days later, on March 17, the Governor prohibited gatherings of 25 or more people and extended school closures to April 28, 2020. (R.

Exh. 64 (p. 1) (noting that the President of the United States declared the Covid–19 outbreak a national emergency on March 13, 2020).)

On March 23, the Governor issued Executive Order No. 20–12, stating that individuals should stay at home or at their place of residence to the maximum extent possible during the ongoing state of emergency (consistent with executive orders and guidance issued by the Oregon Health Authority). Regarding workspace restrictions, the executive order: stated that effective March 25, businesses shall facilitate telework and work-at-home by employees to the maximum extent possible; and prohibited work in offices whenever telework and work-at-home options are available. To the extent that telework and work-from-home options were not available, the executive order directed businesses to implement and enforce social distancing policies. (R. Exh. 64 (pp. 3, 5); see also Tr. 2053–2054.)[13]

Based on its understanding of the Governor's executive order, Respondent (among other measures) began having its office staff work remotely and staggered the shifts of office staff who needed to work at the facility. Respondent also stopped permitting outside visitors and implemented 6–foot social distancing rules for employees who continued to work on the production line and in the warehouse. The Union was also aware of the Governor's executive order and the restrictions related to the Covid–19 pandemic. (Tr. 876, 878–879, 1529–1531, 1533–1535, 1838–1839, 2326–2327.)

M. March 30, 2020: Seventh Bargaining Session

1. Discussions and proposals during bargaining

Due to the Covid–19 pandemic and related restrictions, the parties agreed to bargain by telephone on March 30 and exchange bargaining proposals by email. To start the process, Bremer Moore emailed Respondent's proposal to the Union on March 25, noting Respondent's hope "that the parties will continue to make progress and finalize the agreement" in the following week (March 29 – April 4, 2020), and emphasizing that Respondent was not interested in any retroactive pay increases. In its proposal, Respondent specified that the contract should be effective for 4 years (March 1, 2019 through February 28, 2023). Respondent continued to propose that bargaining unit employees enroll in Respondent's health insurance plan and did not change its position on union access to the facility. As for wages, Respondent offered a 1-percent wage increase upon ratification, followed by additional 1-percent increases in March 2021 and March 2022. (GC Exhs. 74–75; Tr. 709–713, 873–876, 879–880, 882–884, 1536–1537, 1539–1543, 1962–1964, 2055–2057, 2059, 2132, 2326; see also Tr. 708–709, 875, 1538, 1773–1775, 1972, 2055–2056, 2328, 2376 (noting that when bargaining occurred on March 30, Respondent's team met socially distanced in a conference room at its facility, while the Union's team met in Williams' office in Hood River).)

[13] Towards the end of trial, on June 21, 2021, Respondent requested that I take judicial notice of precautions that various other entities (such as the federal government) took in response to the Covid–19 pandemic. (Tr. 2383–2384, 2401–2403.) I hereby decline to do so because, among other reasons, there is no evidence that Respondent relied on those other entities to craft its own responses to the pandemic in March/April 2020.

Through its proposal, Respondent indicated that it was proceeding with a combination of wage increases and having employees switch to Respondent's health insurance plan (as suggested in "Option 2" of the contract proposal that the Union presented at the end of the day on March 10). Accordingly, the Union (with Williams acting as its spokesperson since Beranbaum was not present) proposed that employees would move to Respondent's health insurance plan effective May 1, but included language to specify that: (a) employees who worked or earned 80 or more hours in the preceding month would be covered under the plan; (b) for the entire contract period, Respondent would adhere to fixed amounts for annual deductibles and out of pocket maxima; and (c) for the entire contract, Respondent would provide a medical expense reimbursement program that would reimburse all out of pocket expenses between $350 and $2150 per calendar year for individuals (and up to $3200 for families). For wages, the Union abandoned its request for wage increases retroactive to March 2019, but called for a 3-percent wage increase retroactive to March 1, 2020, followed by increases of 3.25 and 3.50 percent in March 2021 and March 2022, respectively. (GC Exh. 76 (Arts. 7–8, Schedule A); Tr. 286, 507, 676–677, 708, 713–719, 884–892, 910–911, 1543–1546, 1964–1966, 2007–2008, 2061–2065, 2131.)

After reviewing the Union's proposal, Respondent objected that it was regressive on wages because the Union was seeking a 9.75-percent increase over the life of the contract instead of 6 percent (as stated in the Union's proposal on March 10). The Union disagreed, asserting that its wage proposal would cost Respondent less money over the life of the contract because the wage increases were backloaded and because the Union's proposal included a wage freeze from March 2019 to March 2020.[14] Respondent offered another proposal in which it generally held to its previous positions, though Respondent did commit to specific amounts for health insurance deductibles and out of pocket maxima and to providing a medical expense reimbursement plan that was no less favorable to employees than the one in place at the time of ratification. (GC Exh. 77 (Arts. 6–7); Tr. 718–722, 892–895, 1546–1549, 1775–1777, 1966–1968, 2065–2066, 2133–2134; see also GC Exh. 87 (p. 6) (noting that Respondent saw the Union's wage proposal as regressive because it called for "increases totaling 9.75% over three years (compared to its past request of 6%)").)

[14] The parties were talking past each other on this point, as Respondent was focused on the total percentage of wage increases during the contract term, while the Union was focused on the amount that the wage increases would cost Respondent during the contract term. To illustrate the Union's point, I note that under the Union's March 10 proposal, an employee earning $10,000 per year would see their wages increase as follows: 2019 ($10,000 x 1.02 = $10,200/year); 2020 ($10,200 x 1.02 = $10,404/year); 2021 ($10,404 x 1.02 = $10,612.10/year); total cost for 3–year period ($31,216.10). Under the Union's March 30 proposal (but excluding the fourth year for purposes of an even comparison), that same employee would see their annual wages increase as follows: 2019 (wage freeze = $10,000/year); 2020 ($10,000 x 1.03 = $10,300); 2021 ($10,300 x 1.0325 = $10,634.75/year); total cost for 3–year period ($30,934.75). The evidentiary record does not show that the parties delved into these types of calculations during bargaining, or what the numbers would look like if they factored in a fourth contract year (the Union's March 10 proposal was only for a 3–year contract, and thus did not specify what wage increase, if any, would apply in 2022), or expenses/savings in other areas that relate to wages (e.g., 401(k) plan matching contributions, time loss payments that would no longer be needed if employees enrolled in Respondent's health care plan).

In the early afternoon, the Union presented another proposal. Because the Union questioned whether a move to Respondent's health insurance plan could be completed by May 1 and also sought to avoid having a time period when Respondent (in the Union's view) would be obligated to pay for health insurance under both OPET and Respondent's plan, the Union proposed that employees join Respondent's health insurance plan in the first month following contract ratification. The Union also renewed its proposal that employees who worked or earned 80 or more hours in the preceding month would be covered under Respondent's health insurance plan and accepted Respondent's proposal for the medical expense reimbursement program. Last, the Union lowered its proposed wage increases, calling for a 2.75-percent wage increase retroactive to March 1, 2020, followed by increases of 3 and 3.25-percent in March 2021 and March 2022, respectively. (GC Exh. 78 (Arts. 6–7, Schedule A); Tr. 724–726, 895–899, 1968–1970, 1992–1993, 2009–2010, 2066–2068.)

In further discussion, the Union asked Respondent to provide the cost of its health care plan, prompting Respondent to question why the Union needed that information since Respondent would be paying the entire cost of the plan. The Union explained that it wanted to compare the cost of Respondent's plan to what Respondent had been paying for the OPET plan because that could enable the parties to discuss whether Respondent should allocate any health care plan savings to other parts of the contract (such as a higher wage increase). The parties also disagreed about: the effective date of the move to Respondent's health insurance (Respondent wanted May 1, 2020; the Union wanted 1 month after contract ratification); and the hours necessary for employees to be eligible for health care coverage (the Union contended that employees who worked or earned 80 hours in the preceding month should be eligible, as was the case under the OPET plan in the expired agreement, while Respondent suggested that it was not necessary to specify the 80 hour/month requirement).[15] (Tr. 727–729, 732–734, 810–811, 901–902, 916–918, 2063–2064; see also GC Exh. 2 (expired agreement, specifying, in Arts. 6 and 7, an 80 hour per month eligibility threshold for employees to be eligible for health insurance coverage).)

2. Respondent makes a last, best, and final offer

After the telephone discussions concluded on March 30, Bremer Moore emailed Williams to convey Respondent's last, best, and final offer. Bremer Moore stated as follows in her email:

> Attached is HRD's counter. As I stressed on the phone, this is the company's last, final and best offer and the company is unwilling to entertain any further concessions on the wages. The parties also appear to be at loggerheads on Art. 1, Section 4 [union access] and Art. 8, Sec. 2 [401(k) plan]. We've gone back and forth with no movement on either side.
>
> In an effort to get a deal today, HRD[] proposes:

[15] During trial, Bremer Moore stated that it was not necessary to specify the 80-hour/month eligibility requirement for Respondent's health insurance because Art. 4, Sec. 2 of the contract defined a regular employee as an employee who works 1,550 hours in a year. (Tr. 2063–2064.) I give little weight to that explanation because the health insurance provisions in the expired contract included the 80-hour/month eligibility language even though that contract also defined a regular employee as someone who worked 1,550 hours in a year. (See GC Exh. 2 (Art. 4, Sec. 2; Arts. 6–7).)

Art. 1, Sec. 4 – HRD's language [Representatives of the Local Union shall be admitted to the Company's plant upon notification to the plant office, signing in as required and wearing all proper PPE, and shall be allowed only in non-production, public areas unless accompanied by a member of management.], ***see below**

Art. 6 and 7 – May 1, 2020 will be the start date [for coverage under Respondent's health insurance plan]. We confirmed that all regular employees must work an average of at least 32 hours/week to achieve the 1,550 hour/year under Art. 4, Section 2 and, therefore, the 80 hour/month qualifier is not necessary

Art. 8, Section 2 – HRD will accept the Union's proposed language ["Employees may contribute to the Hood River Employees' Savings and Retirement Plan (the Company's Plan) up to the maximum amount authorized by law. The Company shall provide no less than a two hundred and thirty percent (230%) match to employee contributions, up to a maximum of 4.347% of the Employee's annual gross earnings.], ***contingent on Union accepting Art. 1, Section 4**

Schedule A – HRD's language [1 percent wage increases upon ratification, in March 2021 and March 2022]

If a phone call would be helpful, we are available.

(GC Exh. 79 (p. 1 and Arts. 1, 6–7, Schedule A) (emphasis in original); Tr. 731–732, 807–808, 899–906, 1552–1556, 1970–1971, 2068–2071; see also GC Exh. 78 (Art. 8); Tr. 730–731, 734, 903–905 (noting that the Union was concerned that a 1,550 hour per year requirement for health care coverage, which equated to 129 hours per month, might disqualify a significant percentage of the bargaining unit).)

Following Respondent's final offer, Bremer Moore and Williams exchanged a series of emails on March 30 about the status of bargaining and what next steps were appropriate. The exchange proceeded as follows:

Williams: We have received your offer and given the Employer['s] position, our bargaining team thinks that it makes sense for the parties to seek the assistance of a Federal Mediator. We should secure a date that works for all parties to hold an in person mediation session.

Bremer M.: We are available to meet anytime next week. Please provide your availability. Your proposal to meet in person is not acceptable given the unpredictable circumstances with COVID–19. Delay is not an option with the various virtual means of bargaining. Please provide dates today so that we can arrange a time with the mediator.

Williams: After convening via teleconference today and seeing where it landed us, I think that a meeting in person is absolutely necessary. We will be in contact with the Mediator.

> Bremer M.: The Union's response is unacceptable and an unlawful refusal to bargain. We've experienced the Union's delay tactics in an attempt to maintain the status quo, but HRD will not tolerate the deliberate scheme any longer. The world has not stopped due to the [coronavirus], as the employees that the union represents know well. They are continuing to show up to work every day to do their job, and the Union should do the same.
>
> I appreciate the progress the parties made today on health care; however, the company and union have come as far as they can go on the other open matters. We've held six bargaining sessions and are no closer on wages, 401k and the union's access to the facility. Unless the union demonstrates some intention to entertain HRD's wage proposal of 1% at ratification, 3/1/2021 and 3/1/2022, we are at impasse.
>
> Please indicate if the union will agree to bargaining in good faith with a mediator next week, or if the union acknowledges that the parties are at impasse. In all events, I will contact [the mediator] tomorrow to seek her availability.

(GC Exh. 80; see also Tr. 731, 735–740, 808–810, 906–909, 1556–1560, 1973, 2071–2078, 2086, 2139.)

N. March 31 through Mid–April 2020: Additional Communications related to Possible Further Bargaining

1. Parties fail to agree on additional bargaining

On March 31, the Union emailed Respondent to express its strong disagreement with the claims that the parties were at impasse or that the Union was refusing to bargain, and asserted that the parties should meet face to face to bargain with the assistance of a mediator. The Union also made a written request that Respondent provide the cost of its proposed medical, dental and vision plans, broken down by type of coverage (e.g., employee, employee spouse, family) if applicable. (GC Exh. 81; Tr. 743, 811–813, 915–919, 1560–1561, 2087–2089.)

In about late March/early April, both the Union and Respondent reached out to the assigned FMCS mediator. The parties disagreed, however, about how bargaining with the mediator should proceed. Respondent advocated for bargaining by telephone or videoconference due to the Covid–19 pandemic and the mediator's unavailability at the time to meet in person. The Union, meanwhile, advocated for bargaining in person on the first available date (the Union understood that the mediator's office was closed but it was not clear to the Union whether the closure would be brief or lengthy). Each party believed that the mediator endorsed its preferred method for bargaining. (GC Exh. 83–84; Tr. 740–747, 919–924, 1561–1562, 2089–2093, 2330.)

On April 9, Williams and Bremer Moore exchanged the following additional emails about bargaining with a mediator:

> Bremer M.: I just received the disappointing news from [the mediator] that the union is refusing to bargain unless face to face, which as the union well knows will be months from now. We have offered Zoom conferencing which overcomes the union's obstacle of insisting on in-person negotiations. The union's continued refusal to bargain in good faith leaves HRD with the last resort of filing [an unfair labor practice charge] with the NLRB, which I will do tomorrow. Also, effective immediately, HRD will stop collecting union dues from employees under the expired contract.
>
> Williams: As stated previously on multiple occasions the Local Union is more than willing to schedule negotiations in a face to face setting. If that date comes and the Federal Mediator [cannot] meet, we will reschedule to the first available date the Mediator can meet with us.
>
> Bremer M.: You have until tomorrow to reconsider the union's unlawful position. Then, the NLRB (all working hard by telecommuting and meeting by teleconference and video conference) can decide. I'll be working late tonight, in a [Z]oom bargaining session, if you change your mind.

(GC Exh. 85; Tr. 747–748, 814–816, 924–929, 944, 1563–1568, 2093–2097; see also R. Exh. 77 (unfair labor practices charge filed by Respondent on April 9, 2020); Tr. 679–680, 814 (noting that the mediator the parties had been communicating with retired in about mid–April 2020, prompting another mediator to be assigned).)

2. Union posts memorandum about the status of bargaining

In around the same early April time period, the Union posted a "Negotiations Update" for bargaining unit members. The update stated as follows, in pertinent part:

> On March 30, 2020, your Union [b]argaining team met with your employer and its legal counsel in a good faith effort to achieve a Contract that respects both the hard work you do every day to make this employer successful and achieve the goals you and your co-workers set for a new contract. . . .
>
> We will continue to [n]egotiate in Good Faith with your employer but . . . we are going to be seeking the assistance of a Federal Mediator. . . . As soon as we are able to schedule negotiations, with the Federal Mediator present, we will let you know. However, it is probably likely the Mediator will not be available and willing to meet in person until after the State's shelter in place order is rescinded. . . .
>
> Due to the COVID–19 Pandemic, and the Governor's emergency declaration we will not be able to hold a meeting at this time but if you have any questions please contact your Shop Stewards and/or your Business Agent.

(GC Exh. 82; Tr. 677–680, 912–913, 1562–1563, 2099–2101; see also Tr. 507–509, 742, 815 (noting that the Union thought that the Covid–19 pandemic would pass quickly).)

3. Respondent provides information about its health care plan

On April 14, Respondent provided information to the Union about the cost of Respondent's health care plan. Respondent also asked the Union to assist with obtaining information from OPET about the number of employees and dependents covered under the OPET plans. The Union agreed to see what it could do regarding Respondent's information request to OPET. (GC Exh. 86; Tr. 749, 929–931, 1569–1570, 1777–1778; see also Tr. 1570–1571 (noting that Respondent never received the information that it sought from OPET).)

O. April 23, 2020: Respondent Reiterates that the Parties are at Impasse and States that it Will Implement its Final Offer on May 1, 2020

On April 23, 2020, Respondent sent a letter to the Union to assert that the parties were at impasse and that Respondent intended to implement its final contract offer. Respondent stated as follows, in pertinent part:

> Hood River Distillers (HRD) has carefully reviewed the parties' bargaining history, which leads HRD to conclude that since March 30, 2020, the parties have been at an impasse and that the Union has since then engaged in an unlawful refusal to bargain in an effort to continue to perpetuate the terms and conditions of the expired agreement. Based on the impasse reached at the last meeting on March 30, 2020, together with the Union's subsequent refusal to meet and bargain and other attempts to frustrate the bargaining process, HRD intends to implement its final contract offer to the Union (referred to as the Final Offer herein). I enclose the Final Offer with this letter. . . .
>
> Since the parties' last meeting, HRD has offered to meet by video conference. The Union refused. . . . As of the date of this letter, the Union continues to refuse to provide any bargaining dates and will not go back to the table until some indefinite time. . . . HRD's diligent and earnest efforts to reach an agreement on a contract have been repeatedly undermined by the Union's tactics designed to thwart impasse – presently, by exploiting the state's social distancing order. . . .
>
> Due to the fact of impasse, we believe our duty to bargain is suspended at this time and we intend to implement the terms of the Final Offer effective May 1, 2020. If the Union has any specific proposals on any of the open issues, HRD will carefully consider those proposals to see if they break the impasse that exists. HRD is ready, willing, and able to restart negotiations as soon as the impasse is no longer in place.

(GC Exh. 87 (pp. 1, 6–7); Tr. 751–752, 931–932, 2101–2103.)

In an April 24, 2020 letter, the Union replied to the news that Respondent planned to implement its last, best and final offer. The Union stated as follows, in pertinent part:

> I am in receipt of your letter dated April 23, 2020 claiming that the parties are at impasse and threatening to implement your last offer effective May 1, 2020. Let me first make it very clear to you, the Union categorically denies your claim that the parties are at impasse. In our last two bargaining sessions the Parties reached agreement on a number

> of proposals that the Employer has previously claimed the Parties to be at impasse on. . . . If you attempt to implement the offer the Union reserves its right to take any and all legal and/or economic action to protect the integrity of the collective bargaining process.

(GC Exh. 88 (p. 1) (noting that the Union believed "that there is still bargaining to be had between the Parties"); Tr. 753–754, 2104–2106.)

P. Late April 2020: Respondent Prepares to Implement Final Offer while Union Prepares for a Possible Strike

1. Respondent prepares to enroll bargaining unit members in its health care plan

On April 27, 2020, Respondent posted and distributed the following memorandum to bargaining unit employees regarding its last and final contract offer and open enrollment in Respondent's health care plan:

> Enrollment is now open for Hood River Distillers health benefit coverage that will begin on May 1, 2020. You should have each received an email this morning regarding how to enroll in the benefit plans. This is the only company **paid** health coverage option for all employees as of May 1, 2020; Hood River Distillers will stop paying for [OPET] coverage as of April 30, 2020. If you do not enroll in our insurance by May 1, 2020, you will no longer be receiving insurance coverage paid by Hood River Distillers, and will have to find alternative coverage as mandated by the Affordable Care Act. . . . If you chose not to enroll in Hood River Distillers company paid health plan, please let Human Resources know.
>
> Enclosed: Last and Final Contract that will be implemented May 1, 2020.

(GC Exh. 89 (emphasis in original); Tr. 1031–1034, 1075–1077, 1106, 1573; see also GC Exhs. 91–93 (emails to employees about health insurance enrollment).) Respondent asked employees to sign copies of the last and final contract and return the copies to management. (Tr. 1032–1033.)

Almost all of the bargaining unit employees chose not to sign the contract or enroll in Respondent's health insurance plan and many employees, in protest, simply returned the unsigned documents to Respondent's management. As for enrollment in Respondent's health insurance, Respondent noted that two bargaining unit employees who attempted to enroll did not have enough hours to qualify for coverage. (Jt. Exh. 2 (p. 14); Tr. 1035–1036, 1078–1079, 1099, 1214, 1573.)

2. Union holds pre strike meeting

In late April 2020, the Union held an outdoors meeting for bargaining unit members about Respondent's last and final offer and the next steps that the Union should take. Bargaining unit members decided that they would go on strike if Respondent implemented its final offer but would continue working until they heard from Union representatives. (Tr. 511–514, 755–756, 936, 1034–1035, 1047, 1077–1078, 1098–1099.)

Soon after the meeting, Beranbaum attempted to contact Respondent's president, Ron Dodge, to see if they could discuss a way to resolve the bargaining dispute. Bremer Moore later informed Beranbaum that Dodge would not be speaking with him and that Respondent intended to proceed with implementing its final offer. Beranbaum indicated that the Union would "react" if Respondent did so, which Bremer Moore interpreted as meaning that the Union would call a strike. (Tr. 513, 515–517, 682–683, 692, 2106–2108; see also R. Exh. 84 (Union press release, dated April 29, 2020, stating that a labor dispute was looming at Hood River Distillers); Tr. 1571–1572.)

Q. May 1, 2020: Respondent Implements Final Offer and Stops Making Payments to OPET

1. Implementation of final offer

On May 1, Williams emailed Bremer Moore to ask whether Respondent was willing to hold off on implementing its final offer "until the Parties can meet with the Federal Mediator at her first available date to hold face to face Negotiations." Bremer Moore replied that Respondent intended to implement its last and final offer effective May 1, and consistent with that statement Respondent implemented the terms of its March 30, 2020 final offer to the Union. (GC Exhs. 79 (pp. 2–18), 90; Tr. 514, 756–757, 936–937, 1572–1573, 1974, 2108–2109, 2331; see also Tr. 937 (noting that the Union was aware that FMCS mediators were still working remotely as of May 1, 2020, and that it was unclear when face-to-face mediation would be possible).)

2. End of payments to OPET

Under the OPET insurance plan, Respondent received an invoice in the first week of each month for the insurance premium that Respondent owed for that month. The amount of the OPET monthly invoice depended on the number of employees who worked 80 or more hours in the preceding month (e.g., for the April 2020 premium, Respondent's invoice from OPET was dated April 6, 2020, and was based on employee hours worked in March 2020). Respondent paid the OPET premium for April 2020. (R. Exh. 149; Tr. 518–519, 1195–1196, 1574–1580, 1779; see also Tr. 518–519 (noting that OPET essentially gives employees a grace period of coverage in the first part of each month because OPET assumes that employees will continue working enough hours to qualify for coverage).)

After implementing its final offer on May 1, Respondent did not pay any additional OPET premiums because Respondent only offered its own health insurance plan to employees. Thus, Respondent did not pay the May 2020 invoice that it received from OPET or any other subsequent OPET invoice. The Union learned from OPET that Respondent had stopped making payments. (Tr. 517–518, 1574, 1576.; GC Exh. 79 (Art. 6, Sec. 1(b) and Art. 7, Sec. 3).)

3. Additional changes resulting from implementation of final offer

The implemented offer included several other changes to the status quo that had been in place since the collective-bargaining agreement expired. Those changes included, but were not limited to: (a) adding new requirements that union representatives needed to follow when

visiting the facility; (b) replacing the formula for Respondent's matching contributions under the 401(k) plan with a more general requirement that Respondent provide "no less than a 230 percent match to employee contributions in an amount defined by the Company Plan"; and (c) increasing wages by 1 percent (with additional 1-percent increases to be provided in March 2021 and March 2022). (GC Exh. 79 (Art. 1, Sec. 4; Art. 8, Sec. 2; Schedule A).)

R. May 6, 2020: Bargaining Unit Members go on Strike

On May 6, 2020, Beranbaum, Kale and Williams came to Respondent's facility and entered the production area, where they announced that bargaining unit employees should collect their personal items and walk out on strike (employees working in the warehouse were also notified). Consistent with that instruction and in protest of Respondent's decision to unilaterally implement its final contract offer, all 25 bargaining unit employees went on strike and walked to the parking lot where they joined with Beranbaum for a brief meeting. The Union subsequently set up picket lines by the entrances to the production facility and the warehouse, with picketers carrying signs stating, "On Strike Teamsters Local No. 670" in typed/printed letters and including the handwritten words "ULP" and "Unfair" in magic marker. (R. Exh. 89 (photographs from the first day of the strike,[16] showing some picketers wearing masks with the Union's logo, and others not wearing masks); Tr. 163–164, 287–288, 510–511, 762, 765–766, 820–821, 938–940, 952–953, 983, 1005, 1056, 1080, 1094–1095, 1105–1106, 1148, 1281, 1583, 2292–2293, 2331; see also R. Exh. 131 (May 7, 2020 letter in which Respondent asserted that union representatives criminally trespassed by entering Respondent's property without authorization and in violation of company policies and legal rules); CPU Exh. 15 (pp. 2–3) (list of employees working for Respondent as of about May 6, 2020); Tr. 1581–1582, 1866–1867.)

On the same day, the Union issued a press release titled, "Teamsters: Workers Strike to Defend Against Employer's Flagrant Violations of Labor Law." In the press release, the Union asserted that:

> [W]orkers at Hood River Distillers . . . were forced to strike as their employer illegally implemented a labor agreement on them with a lesser medical plan than they have enjoyed for decades while at the same time shifting a larger cost of the medical plan onto employees. . . .
>
> Hood River Distiller's deplorable action to unilaterally implement a contract during this COVID–19 pandemic that would slash the health and welfare benefits, reduce retirement

[16] Respondent's Exh. 89 includes the following photographs from May 6, 2020: employees and Beranbaum exiting the production facility (pp. 13–18); employees meeting with Beranbaum in Respondent's parking lot after walking out (pp. 11–12); and employees on the picket line with the picket signs described herein (pp. 1–12). (R. Exh. 89; Tr. 2274–2278 (explaining that the Union hand wrote "ULP" and "Unfair" on pre-printed signs that it had left over from a different strike).)
I do not credit Sumerfield's testimony that the picket signs did not have "ULP" or "Unfair" handwritten on them for the first few days of the strike. (See Tr. 1584–1585.) That testimony is undermined by other evidence in the record, including photographs from the first day of the strike that show the handwritten "ULP" and "Unfair" language on strikers' picket signs. (See, e.g., R. Exh. 89 (showing employees walking out of Respondent's facility on May 6, and showing the same employees carrying the picket signs while still in their Hood River Distillers attire or other attire that they wore to work on May 6).

security and offer little to no wage increases to offset their proposed reductions in other areas of the labor agreement is a flagrant example of an employer putting profits before people!

(GC Exh. 104; Tr. 685–686, 690–691.)

S. May 6 through August 31, 2020: Strike and Related Events

1. Picket line setup and practices

In connection with the strike, the Union set up two picket lines. The picket line at Respondent's production/bottling facility was located on Riverside Drive, with picketers passing by two driveways for the facility. The other picket line, at Respondent's warehouse, was located on Portway Avenue, with picketers passing by one of the two driveways for that facility. Picketers followed a practice of picketing in a constant motion in front of driveways for a maximum of 2 minutes before they paused to allow waiting vehicles to enter or exit the driveways. Both trucks and personal vehicles used the various driveways. (Tr. 769–770, 782–783, 791, 953–958, 983–986, 1010–1011, 1107, 1109–1110, 1115–1118, 1148–1149, 1151–1162, 1202–1204, 1631–1633; GC Exhs. 106–107 (diagrams of the facilities where picketing occurred); R. Exhs. 89 (pp. 1–11) (photographs of picketers on May 6, 2020), 151 (aerial photographs of Respondent's bottling and warehouse facilities).)

2. Respondent hires replacement workers at wage rates that differ from the terms of the implemented offer

At the start of the strike, Respondent managed to keep its operations running to some extent by having managers, administrative staff, friends, and family work on the production line and in the warehouse. When it became clear that the strike would last more than a few days, however, Respondent began hiring replacement workers in about mid–May 2020. Over the course of the strike, Respondent hired approximately 25 replacement workers, usually as temporary employees with the potential to move to permanent positions (though some new hires started as permanent employees). (GC Exh.105; CPU Exh. 16; Tr. 763, 1254, 1281, 1595–1596, 1598–1603, 1618, 1780, 1874–1876, 2179, 2332–2333; see also GC Exh. 34 (June 8, 2020 letter in which the Union asserted that all individuals performing bargaining unit work, including replacement workers and nonbargaining unit employees, were required to become union members); R. Exh. 95 (May 13, 2020 newspaper article in which Beranbaum stated that the Union would "stay out as long as it takes"); Tr. 1596–1598 (discussing R. Exh. 95 and noting that based on Beranbaum's statement in the newspaper article, Respondent believed that the strike would last longer than it initially thought).)

Respondent did not follow the expired agreement (or implemented offer) when setting the wages of replacement workers. For example, although the expired agreement specifies that all new Bracket 3 employees shall receive the lower Bracket 3A wage for an initial period of time (the employee's first 1000 hours of work, or one year of work, whichever comes first), Respondent paid new employees the standard Bracket 3 wage per hour.[17] Similarly, Respondent

[17] Under the expired agreement, the Bracket 3 wage was $22.67 per hour in 2020, while the Bracket

did not follow expired agreement language specifying that all new employees are paid 75 percent of their wage rate until they complete their introductory period. There is no evidence that Respondent notified the Union in this timeframe about the wage rates that it was providing to replacement workers. (GC Exhs. 2 and 79 (Schedule A), 105; CPU Exhs. 16, 21 (pp. 5–6); Tr. 1218–1222, 1240–1243, 1607, 1712–1714, 1814–1815, 1875–1876, 2207–2208; see also GC Exhs. 2 and 79 (Art. 5, Sec. 1, defining the probationary/introductory period), 105 (p. 5) (characterizing the higher wage rate offered to Juana Cortez as "strike pay").

3. Interactions between strikers and replacement workers

Williams testified that he believed that it was fair game for the strikers to make things somewhat uncomfortable for replacement workers and Respondent's managers when they crossed the picket line. Consistent with that view, it was not uncommon for strikers to show their middle finger or yell various remarks (such as "How can you do this to us!" or "Fucking scab!") to managers and replacement workers as they drove into or exited the facility. Sometimes replacement workers responded to the strikers with their own profanities or gestures such as showing their middle finger or holding their hands to their ears to indicate they could not hear what the strikers were saying. Respondent kept a team of security officers on the property to monitor these interactions to ensure they did not get out of hand. (Tr. 771–772, 783–784, 803, 825–828, 967, 972, 986, 1111–1113, 1132–1133, 1189–1190, 1193–1194, 1213, 2154, 2217, 2230–2231, 2243–2244, 2334; R. Exh. 96; see also Tr. 826 (Williams' testimony that it would be off limits for a striker to engage in physical violence, threaten violence, or make slurs based on race, religion or sexual orientation).)

4. Respondent states that strikers have been permanently replaced

On June 30, 2020, Mitchell appeared in a television news segment about the ongoing strike at Hood River Distillers. Mitchell stated as follows regarding Respondent's hiring of replacement workers:

> Over the last fifteen months we've tried very hard to inform them of, you know, the repercussions of a strike. We told them that they could be permanently replaced if we are able to find new employees. We feel like they had all of the information before they made the decision to walk out.

(GC Exh. 95; see also Tr. 763, 1038–1039, 1041, 1084–1086 (noting that the Union and some bargaining unit members saw the news segment when or shortly after it aired).)

On July 30, 2020, Respondent posted a "Hood River Distillers Labor Dispute FAQ" on its website. Respondent stated as follows regarding its hiring of replacement workers:

> HRD has [] hired 21 permanent replacement workers to fill the 25 open positions left by the striking union members. Once the striking employees agree to return to work, if they are in good standing and there are open positions, they will be reinstated. If there is not

3A wage was $17.21 per hour. (See GC Exh. 2 (Schedule A).)

> an open position, they will be placed on a list and will be called back to work once there is an open position.

(GC Exh. 96 (p. 4); Tr. 764, 1042–1043, 1085 (noting that the Union and some bargaining unit members saw this web posting).)

T. Ismael Marquez – Strike/Picketing Conduct

Ismael Marquez began working for Respondent in May 2002, and was working as a full time senior blender until the strike began in 2020. Marquez was a member of the bargaining unit and had a clean disciplinary record. (Tr. 951–952, 974, 1976.)

On about May 7, Marquez was on the picket line in front of the production facility. The picket line paused to allow a waiting car (driven by a nonbargaining unit employee) to exit. Mitchell, who was driving the next car in line, accelerated to proceed out of the driveway exit. Through a combination of Marquez continuing to pause and Mitchell swerving, Mitchell exited the driveway without hitting Marquez or anyone else on the picket line. (Tr. 957–958, 1166–1169, 1204–1205, 1976–1979, 2010–2011; R. Exh. 91 (Mitchell's incident report, signed on May 8, 2020).)

On about June 2, Marquez was on the picket line in front of the production facility when a truck prepared to exit the facility (driving forward from the loading dock).[18] Juana Cortes,[19] who had resumed working for Respondent during the strike, walked into the parking lot and began directing the truck towards the driveway exit. When Cortes was 5–10 feet from the picket line, she began walking backwards and holding her arms out horizontally. Cortes then backed into the path of the picket line, where she and Marquez bumped into each other (shoulder/arm to shoulder/arm), prompting Marquez to say "Don't touch me. Don't fucking touch me." Marcus Williams, who was present, yelled over to a nearby security guard to request that Cortes be escorted away from the picket line. Cortes verbally reported the incident to the staff in Respondent's office, who asserted that the picketers were blocking traffic. Both Respondent and Williams subsequently called the police. Police officer Michael Martin responded to the scene and advised Cortes and Marquez that there was not a basis for a police report since, among other reasons, no one claimed injury. Officer Martin further advised Cortes and Marquez that they should not have any more physical contact. (Tr. 792–795, 960–964, 977, 1014–1020, 1051–1052, 1133–1136, 1138–1140, 1170–1178, 1206–1208, 1637, 1780–1781, 2196–2199, 2208–2209, 2341; GC Exh. 44; see also R. Exh. 140 (pp. 8–9) (handwritten statements from two strikers about the incident, provided by the Union to Respondent in or after September 2020 in connection with Marquez' grievance proceedings); Tr. 829–832.)[20]

[18] In contrast to other witnesses who were present, Cortes and Sumerfield testified that the truck was on Riverside Drive and needed assistance backing into the loading dock (instead of needing assistance leaving the property from the loading dock). (See Tr. 1638–1639, 1786, 2197.) That difference in testimony is not material to my analysis.

[19] Cortes and Marquez agree that they had been friends outside of work before the strike, visiting each other's homes to watch football games or joining in other social events/outings. Cortes was previously married to Gaudreault, who also observed that Cortes and Marquez were friends before the strike. (Tr. 971, 978, 2195, 2210–2211, 2342.)

[20] Cortes' incident report states that the incident occurred on May 11 and that she signed the report

On about June 4, Respondent prepared an incident report based on a verbal statement from an unidentified Oakley tanker truck driver. The incident report states that Marquez walked very close to the back end of an Oakley tanker truck such that the driver was afraid he would hit Marquez. Marquez denies engaging in this conduct, noting that for the incident to have occurred, he would have had to been on Respondent's property because tanker trucks drive forward when entering and exiting the facility driveway located in the southeast corner of the property. There is no other evidence in the record to corroborate the allegations in the incident report. (Tr. 966, 1144–1145, 1655–1656, 2338–2340; R. Exh. 101; see also Tr. 798–799, 966–967, 1248 (explaining that tanker trucks use the southeast corner driveway to drive forward on to Respondent's property and only back up when using a gravel lot on the property to get in position to deliver product into Respondent's silos), 1022, 1144 (noting that Oakley trucks that come to the facility are tanker trucks that carry alcohol).)[21]

In about June 2020, Mitchell was driving near Respondent's facility and passed by Marquez, who was driving away from one of the picket lines. According to Mitchell, Marquez showed his middle finger to her as their cars passed each other.[22] Marquez denies engaging in this conduct but noted that strikers often would wave at managers to see what kind of reaction they would give. (Tr. 972, 978–979, 1979–1981; R. Exh. 100 (Mitchell's incident report).)

On about August 20, Cortes and her girlfriend Chelsee Campbell were in the parking lot outside of the production facility after finishing lunch together. As Campbell began to drive away and Cortes was about to walk into the facility, they heard someone yell "Fucking dyke!" from the picket line and Campbell saw a picketer hold his fingers in a "V" shape and stick his tongue between his fingers. About 2 days later, Campbell and Cortes drove by the picket line

---

on May 12. (R. Exh. 93.) I do not credit those dates since they conflict with the City of Hood River Police Department record showing that the call about the incident came in on June 2, 2020. (See GC Exh. 44.) I also note that the discrepancy in dates suggests that Cortes filled out the incident report some time after the incident instead of close to the date that the incident occurred. (See Tr. 1788 (Sumerfield testimony agreeing that she did not know when Cortes filled out the incident report, notwithstanding the dates on the report).) Finally, I give little weight to Cortes' testimony that Marquez slammed into her shoulder so hard that she had to ice it the whole night (see Tr. 2198–2199, 2211) because that testimony is outweighed by other evidence in the record. Among other evidence indicating that no significant injuries arose from the bumping incident, no one reported any injuries to Officer Martin when he was on the scene on the day of the incident, and Cortes did not describe any injuries in the incident report, instead stating only that Marquez "bumped [her] shoulder really hard." (Tr. 1134; R. Exh. 93.)

[21] Sumerfield also testified that Marquez and other picketers would place their feet near vehicles and pretend that the vehicles ran over their feet. (Tr. 1654; see also Tr. 1657 (Sumerfield noted that such an event, standing alone, would not have warranted termination). I do not give weight to Sumerfield's testimony that the Oakley truck driver's verbal complaint was based on such an incident, as Sumerfield's testimony on that point was speculative. (See Tr. 1655–1657.)

[22] I note that, somewhat curiously, Mitchell's incident report was edited to indicate that she had two minor children with her in the car at the time of this incident. (Compare R. Exh. 100 (stating that Mitchell was "driving [with] kids" at the time of the incident) with R. Exh. 140 (p. 5) (stating that Mitchell was "driving [with] kids – 2 minor children[]").) I give little weight to this added detail, as there is no evidence that Mitchell's children saw Marquez' alleged gesture (to the extent that such a fact might have any relevance). (See Tr. 1980–1981 (Mitchell testimony that her kids overheard her talking about the gesture with her husband).)

and Campbell identified Marquez as the picketer who made the offensive remark and gesture. Cortes communicated this information to Gaudreault, who prepared an incident report. Marquez denies making the remark and gesture. (Tr. 969–971, 2200–2205, 2209, 2345–2346, 2391–2396; R. Exh. 108; see also Tr. 1181–1182, 2203–2204, 2344 (noting that Campbell had previously been a replacement worker at the facility), 1186–1187, 2309–2310 (picketer Kelly Holmes, who Cortes stated was present at the time of the remark and gesture, testified that she never heard/saw Marquez make such a remark or gesture towards Cortes, Campbell or anyone else).)

U. Jaime Viramontes – Strike/Picketing Conduct

Jaime Viramontes began working for Respondent in January 2019, and was working as a line attendant until the strike began in 2020. Viramontes was a member of the bargaining unit and had one written warning on his disciplinary record. (Tr. 981–983, 995.)

In about mid–May or early June 2020,[23] Viramontes was on the picket line in front of the production facility when Sumerfield came outside to assist a semi-truck that was attempting to back into the parking lot from Riverside Drive. Sumerfield testified that as the truck began to back up, Viramontes intermittently held his picket sign up to block the truck-driver's rearview mirror, prompting Sumerfield to yell that Viramontes should stop and let the driver back up safely. Viramontes denies engaging in this conduct and also denies ever purposely using his picket sign to block someone's view. (Tr. 988, 1658–1660, 1791; R. Exh. 94 (noting that Sumerfield also admonished a different picketer for getting too close to the truck).)

On about May 13, high school student and replacement worker Preston Armstrong came to the production facility. As he drove past the picket line and into the parking lot, Armstrong heard someone yell at him and also heard the sound of a picket sign brushing[24] against the right rear side of his car. Armstrong mentioned the incident to staff in the main office, who asked him to point to the picketer involved in the incident. From the office, Armstrong pointed to a picketer that staff in the office identified as Viramontes.[25] Viramontes denies making physical

[23] The evidentiary record is not clear on exactly when this incident happened within the May/June 2020 timeframe. (Compare R. Exh. 94 (Sumerfield's unsigned incident report, stating that the incident occurred on May 11) with Tr. 1792 (Sumerfield testimony that this incident happened right after the shoulder bumping incident between Marquez and Cortes) and Findings of Fact (FOF), Sec. II(T), supra) (finding that the shoulder bumping incident happened in about early June 2020).)

[24] Armstrong's handwritten incident report is not clear on whether Armstrong wrote "A man brushed my car with his sign" or "A man brashed my car with his sign." (R. Exh. 96.) Armstrong testified unequivocally during trial that he wrote "brushed" on the report. (Tr. 2221.)

[25] During trial, Armstrong testified as follows about the identity of the picketer who brushed his car with a picket sign:

Ms. Osborne:	[D]o you have an understanding of who hit your car with the picket sign?
Armstrong:	More or less.
Ms. Osborne:	Okay. And [] who do you understand that to be?
Armstrong:	I guess, Jaime, yes.

(Tr. 2224–2225.)

contact with any vehicles while on the picket line. (Tr. 994, 1667, 1799, 2216, 2218–2221, 2227; R. Exh. 96.)[26]

Starting in mid–May 2020, Viramontes began making remarks periodically to replacement worker James Cole, who he knew from growing up in Hood River. Initially, as Cole was entering or leaving the production facility and passing the picket line, Viramontes called Cole a fucking scab, showed Cole his middle finger, and said the following (or something similar) to Cole: "Come on man. You used to go to school with me. Come on, you know me. This is my job. You're taking my job. How can you do this to me? Fuck you, man, I guess we're not friends anymore." Viramontes made similar comments on other occasions when Cole entered or left the facility. According to Cole, in some of these exchanges, Viramontes also said words to the effect of "wait until I come to your house," that he was going to come to Cole's house and kick Cole's ass, and that it was only a matter of time before Viramontes would see Cole in town. After a few weeks, Cole reported his concerns to the Hood River Police Department, which sent a police officer who spoke to Viramontes and directed him to leave Cole alone. Viramontes denies threatening replacement workers or making comments about coming to their homes and harming them. (Tr. 989–993, 1113, 2244–2250, 2252–2253; R. Exh. 92 (Cole's typed report, dated July 16, 2020); see also Tr. 990 (Viramontes noting that he said, "you fucking scab" when he saw replacement workers at the facility), 2366 (Gaudreault heard Viramontes yelling at Cole and singling him out among replacement workers).)

On about June 30, Mitchell was in the parking lot and walking towards the entrance to the production facility. Mitchell heard Viramontes yell "Hey Erica, when are you HRD scumbags going to get your shit together!" (Tr. 1983–1984 (Mitchell noting that Viramontes would yell at her in the morning and indicating that such conduct would not automatically result in termination); R. Exh. 103.)

In about mid-July, replacement worker Andrew Culp was entering the warehouse facility when he heard Viramontes yelling. According to Culp, Viramontes yelled that replacement workers would lose their jobs when the strike ended and added "I can't believe you would do this to me. Remember I know where you live." As previously noted, Viramontes denies threatening replacement workers or making comments about coming to their homes and harming them. (Tr. 989–990, 2232–2233; R. Exh. 107; see also Tr. 2231 (noting that Culp knew Viramontes because Culp used to stop by a gas station that Viramontes' parents owned.)

V. August 27–31, 2020: Strikers Make an Unconditional Offer to Return to Work and Respondent Maintains that the Strike was an Economic Strike

After an unsuccessful attempt on August 26 to resolve the strike (and contract dispute) through mediation, the Union sent a letter to Respondent on August 27 to communicate the

[26] I do not credit Armstrong's testimony that he saw Viramontes brush his car with a picket sign. Earlier in his testimony, Armstrong was more tentative, stating that he "was under the impression that it was the picket sign that he was holding, that he stuck out the end of it and hit my car." (Compare Tr. 2227 with Tr. 2219.) I also give little weight to Armstrong's testimony that the picket sign brushing incident left a scratch on his car. Armstrong noted that there are scratches "all over [his] car" and that he did not report the scratch to anyone. (Tr. 2226; see also Tr. 1136–1137 (noting that Respondent's security guards never received a report about a picketer hitting a car with a picket sign).)

strikers' unconditional offer to return to work.[27] The Union stated as follows in its letter, in pertinent part:

> I write this letter on behalf of Hood River Distillers employees represented by Teamsters Local 670, who have been engaged in an unfair labor practice strike since May 6, 2020. . . .
>
> By this letter the strikers hereby unconditionally offer to return to work. These workers will report back at 7:00 A.M. on Tuesday, September 1, 2020. Under established Board law these strikers are entitled to immediate reinstatement regardless of whether Hood River Distillers has hired permanent replacements. Any permanent replacements hired during the strike must be dismissed, if necessary, to reinstate the returning unfair labor practice strikers. Based on this unconditional offer of return to work, Hood River Distillers is required to respond and accept this offer without preconditions. Failure to do so will constitute an additional unfair labor practice and will lead to the union taking further appropriate action. I look forward to your prompt response.

(GC Exh. 100; see also Tr. 520–524, 684–685, 764, 1056, 1086–1087, 1109, 1682–1683.)

On August 31, Respondent sent a letter to the Union in reply to the news that the strikers were making an unconditional offer to return to work. Respondent stated as follows:

> Hood River Distillers understands from the letter dated August 27, 2020, that the union intends to end its economic strike on September 1, 2020. This is welcomed news to HRD.
>
> As a primary matter, however, HRD wholeheartedly disputes that the union engaged in a ULP strike. . . . Based on the union's dilatory conduct, coupled with the union rejecting HRD's last and final offer on March 30, 2020, HRD lawfully declared impasse and was fully within its right to implement its last and final offer on May 1. The union went on strike six days later because it did not like the economic terms of the implemented last and final offer. At no time was the strike a ULP strike (although HRD appreciates why the union has attempted to cast it as such).
>
> For these reasons, HRD has hired replacement workers according to its regular hiring practices. As of this letter, 25 employees have received and accepted permanent job offers with the explicit understanding that they would not be discharged when the strike ended. As of this letter, HRD has no positions available.

[27] The following strikers were covered by the unconditional offer to return to work: Kelli Bell; Susan G. Bell; James Brown; Aron Butler; Jorge Caldera; Jason Cameron; Maria R. Elisea; Roshanda Halliday; Joshua M. Harbert; Ulises Hernandez-Beltran; Kelly L. Holmes; Angelica Lara; Disenia Lara; Eliseo Lara-Aguila; Britt O. Lee; Michele M. Leonard; Nick Malone; Ismael Marquez; Tracey Morrison; Mark A. Nelson; Wendell M. Russell; Isaac O. Sosa; Jose M. Verduzco; Jaime Viramontes; and Matthew Webber. (See Tr. 523–524 (noting that the Union did not exclude any strikers from the offer to return to work).)

> Therefore, beginning on September 1, former strikers, except those subject to discharge for violation of HRD's anti-harassment, anti-violence and safety policies, will be placed on a preferential rehire list and will be immediately returned to work based on seniority when a position becomes available for which they are qualified. A seniority list is attached. . . .
>
> In preparation for employees returning to work, HRD encloses a copy of the company's last and final offer, implemented on May 1, to which the employees have agreed to unconditionally accept upon their return. As for health insurance enrollment, returning employees will be eligible to receive benefits on the 1st of the month immediately following a month in which they work at least 80 hours.

(GC Exh. 101; Tr. 524–525, 764–765, 1683–1685; see also GC Exh. 102 (August 31 letter in which the Union reiterated its position that the strike was an unfair labor practice strike and asserted that Respondent was acting unlawfully by refusing to immediately reinstate former strikers); CPU Exh. 12 (p. 3) (seniority list attached to Respondent's August 31, 2020 letter).)

W. September 1, 2020: Respondent Notifies Strikers about Preferential Rehire List and Terminates Marquez and Viramontes

1. Letters to strikers placed on preferential rehire list

On September 1, Respondent sent letters to 22 strikers (i.e., the 25 strikers, but excluding Marquez, Viramontes, and Mark Nelson).[28] Respondent acknowledged their offers to return to work but stated that it did not have positions available since it hired 25 permanent replacement employees during the strike (which Respondent characterized as an economic strike). Respondent further advised the strikers that they had been placed on a preferential rehire list and would be recalled based on seniority when a position for which they are qualified becomes available. (GC Exh. 103 (letter sent to striker Michelle Leonard); Tr. 1044, 1088.)

2. Ismael Marquez' termination

Also, on September 1, Respondent notified Marquez that his employment with Respondent would be terminated. Respondent stated as follows in Marquez' termination letter:

> This letter is to inform you that your employment with Hood River Distillers, Inc. is terminated effective immediately due to your behavior on the picket line. Over the past 16 weeks, you have engaged in behavior that has violated our safety policy, harassment

[28] Respondent terminated Nelson on September 1 for alleged misconduct during the strike (physically threatening a truck driver for crossing the picket line). After receiving information from Respondent about the allegation against Nelson, the Union determined that it represented the truck driver in another bargaining unit and contacted the driver to find out what happened. The driver indicated that he had never been threatened on the picket line and gave a written statement to that effect. After the Union provided the truck driver's and Nelson's statements to Respondent during the grievance meeting, Respondent rescinded Nelson's termination and placed him on the preferential rehire list. (Tr. 775–777, 1026, 1626, 1677–1680; see also Tr. 1680 (suggesting that Respondent considered the incident to be a "disciplinary action" instead of a "termination action").)

> policy, general code of conduct and the National Labor Relations Act regulations including:
>
> • On several occasions you made harassing and threatening comments to our employees. We take threats of harm and harassing comments very seriously.
>
> • You physically struck an employee while walking on the picket line. Physical acts of violence will not be tolerated.
>
> • You used profane, discriminatory and inflammatory language while making an inappropriate gesture to a visitor. Acts of discrimination will not be tolerated.
>
> Because you are being terminated for cause, you are not entitled to receive any payout of your PTO according to HRD's policies. . . .

(GC Exh. 97; Tr. 1625–1626, 1650–1652, 1675–1676; see also R. Exhs. 127 (pp. 2–3) (Respondent's sexual harassment policy, noting that violations "will result in appropriate corrective action, up to and including termination of employment"), 140 (p. 1) (corrective action report, stating that Respondent terminated Marquez because he "walked in front of moving vehicle; used sexist gesture & comment; intentionally blocked moving trucks; [p]retended to have foot run over; offensive gesture – flipped off CFO; walked extremely close to truck (back end) while moving; hitting or shoving a worker/employee").) Respondent had not previously notified either the Union or Marquez about any allegations of strike misconduct and did not speak to Marquez as part of any investigation into the alleged misconduct. Instead, Sumerfield, Mitchell, and Gaudreault decided to terminate Marquez based on the incident reports they received, the verbal conversations that they previously had with the employees who reported the incidents, and conversations with office staff. (Tr. 772–773, 795–797, 800, 959–960, 969, 971, 1064, 1625–1628, 1653, 1675, 1840–1842, 1844, 1981–1982, 2335–2336, 2356, 2379–2381; see also Tr. 1653–1654, 1901 (noting that Respondent also reviewed the NLRB website, www.nlrb.gov/strikes,[29] for information about tolerable conduct on a strike line).)

The Union filed a grievance to contest Respondent's decision to terminate Marquez. In connection with the grievance, Marquez denied engaging in the misconduct that Respondent identified as the basis for his termination. At some point, Respondent also received handwritten statements from two picketers indicating that Cortes caused the physical contact with Marquez

[29] As of the date of this decision, the NLRB website states as follows concerning misconduct of strikers, in pertinent part:

> Strikers who engage in serious misconduct in the course of a strike may be refused reinstatement to their former jobs. This applies to both economic strikers and unfair labor practice strikers. Serious misconduct has been held to include, among other things, violence and threats of violence. . . . Examples of serious misconduct that could cause the employees involved to lose their right to reinstatement are: [s]trikers physically blocking persons from entering or leaving a struck plant; [s]trikers threatening violence against nonstriking employees; [and] [s]trikers attacking management representatives.

(www.nlrb.gov/strikes.)

on June 2 by walking backwards into the picket line. Respondent provided the Union with copies of the incident reports involving Marquez but did not provide any new or additional evidence. After two meetings conducted by videoconference, the Union and Respondent were not able to resolve the grievance. (Tr. 773, 799, 803–805, 966, 973–974, 1678–1680; R. Exh. 140 (pp. 8–9 (statements of pickers Kelly Holmes and Kelli Bell, attached to the corrective action report that Respondent prepared for Marquez' termination).)

3. Jaime Viramontes' termination

Respondent also terminated Viramontes on September 1, stating as follows in Viramontes' termination letter:

> This letter is to inform you that your employment with Hood River Distillers, Inc. is terminated effective immediately due to your behavior on the picket line. Over the past 16 weeks, you have engaged in behavior that has violated our safety policy, harassment policy, general code of conduct and the National Labor Relations Act regulations including:
>
> • Using your picket sign to cover and obscure a semi-truck driver's window, blocking his view. This is a serious safety violation.
>
> • On several occasions you made harassing and threatening comments, specifically telling replacement workers that you knew where they lived or would find out where they lived, implying that you intended to come to their house and harm them or their families, causing these employees to feel in fear for their and their families lives. We take threats of harm and harassing comments very seriously.
>
> • You struck the vehicle of an employee with a picket sign. Physical acts of violence will not be tolerated.
>
> Because you are being terminated for cause, you are not entitled to receive any payout of your PTO according to HRD's policies. . . .

(GC Exh. 98; Tr. 982, 987, 1625–1626, 1676–1677.) Respondent had not previously notified either the Union or Viramontes about any allegations of strike misconduct and did not speak to Viramontes as part of any investigation into the alleged misconduct. As with Marquez, Sumerfield, Mitchell and Gaudreault decided to terminate Viramontes based on the incident reports they received, verbal conversations that they previously had with the employees who reported the incidents, and conversations with office staff about what they remembered. (Tr. 772–773, 779, 783–784, 987–989, 995, 1026, 1064, 1625–1628, 1675, 1799–1800, 1840–1842, 1844, 1986–1987, 2379–2381; see also Tr. 1653–1654, 1901 (noting that Respondent also reviewed the NLRB website, www.nlrb.gov/strikes, for information about misconduct on a strike line).)

The Union filed a grievance to contest Respondent's decision to terminate Viramontes. In connection with the grievance, Viramontes denied engaging in the misconduct that Respondent identified as the basis for his termination. Respondent provided the Union with

copies of the incident reports involving Viramontes but did not provide any new or additional evidence. After two meetings conducted by videoconference, the Union and Respondent were not able to resolve the grievance. (Tr. 773, 777–781, 784–789, 996–997, 1678–1680.)

4. Disciplinary practices and comparator evidence

Before taking disciplinary action, Respondent usually follows a practice of investigating the issue by, among other steps, speaking with the individual making the allegation, talking to any witnesses, and also speaking with employee facing potential discipline to get their side of the story. If the employee requests, a union steward can be present when Respondent speaks with the employee about the alleged infraction. (Tr. 1007–1010, 1058–1063, 2377–2739.)

The evidentiary record does not include any documentation showing how Respondent meted out discipline in the past for misconduct similar to what Marquez and Viramontes allegedly engaged in (e.g., threats of violence, harassment of another employee based on sexual orientation, safety violations). However, Viramontes testified (without rebuttal) that he and a coworker received written warnings in April 2020 for a confrontation in which the coworker pushed Viramontes. (Tr. 995–996.) Similarly, Leonard testified (without rebuttal) that in about 2011, an employee received a letter in his file and was placed on probation for 1 year for harassing a coworker. (Tr. 1058–1060 (noting that Leonard was present in the disciplinary meeting in her capacity as shop steward).) Finally, it was common for employees to use profanity while at work. There is no evidence in the record showing that Respondent took disciplinary action against employees for using profanity in casual conversation or towards another employee. (Tr. 997, 1000, 1025, 1114–1115, 1194, 1209.)[30]

X. Fall 2020: Respondent Makes Changes to Certain Terms and Conditions of Employment

1. Additional paid holidays

On September 18, 2020, Respondent notified employees that they would receive 4 additional paid days off between December 24–31, 2020 (the 4 weekdays that employees normally would work in that time period) as a thank-you for their hard work during the year.[31] Although Respondent noted the additional paid holidays concept in a strike settlement proposal that it provided to the Union (via the mediator) on August 26, 2020, there is no evidence that that the parties agreed to this change in holidays or bargained to impasse over the issue. There is also no evidence that Respondent subsequently contacted the Union to notify it of any plan to proceed

[30] I give little weight to Sumerfield's testimony about what might be appropriate discipline for some of the individual incidents that formed the basis of Respondent's decisions to terminate Marquez and Viramontes. Sumerfield's testimony on this topic was speculative and was not connected to any specific policies or practices dictating what level of discipline would apply to the alleged misconduct. (See, e.g., Tr. 1661, 1670–1671; see also R. Exh. 127 (p. 3) (harassment policy, including the general statement that violations "will result in appropriate corrective action, up to and including termination of employment").)

[31] I do not credit Sumerfield's testimony that Respondent had an established practice of granting bonuses or other benefits to employees beyond what was specified in the collective-bargaining agreement. Sumerfield's testimony on the point was general and vague, with the one-time bonuses after the Pendleton Whisky sale identified as the only concrete example. (See Tr. 1700–1701; see also FOF, Sec. II(B), supra (discussing the Pendleton Whisky sale in 2018, and corresponding bonuses).)

with providing the additional paid holidays. (GC Exh. 94 (p. 7); R. Exh. 111 (p. 2, item 2); Tr. 520–521, 1261–1262, 1265–1266, 1699–1700, 1815, 1863–1864; compare GC Exhs. 2 and 79 (Art. 10, Sec. 2, identifying the December and January holidays as the day before Christmas, Christmas Day and New Year's Day); Tr. 1198 (same).)

2. PTO policy

Also on September 18, 2020, Respondent notified employees that, effective January 1, 2021, it would follow a new policy for paid time off (PTO). Among other differences from the expired agreement, under the new PTO policy employees would receive a frontloaded amount of PTO in the following amounts based on the length of continuous service: less than 1 year of service (80 hours PTO); 1 through 5 years (120 hours); 6 through 10 years (160 hours); 11 through 15 years (200 hours); and 16 years or more (240 hours). Respondent also specified that employees would only be able to carry over 40 hours of PTO into the next leave year starting in 2023 (the carry over cap was 120 hours in 2021 and 80 hours in 2022). (GC Exh. 94 (pp. 3–4, 7–8); Tr. 1224–1226, 1228–1237; compare GC Exh. 2 (Art. 12, Sec. 1 of the expired agreement, allowing employees to "bank" up to 120 hours of PTO from the previous year, and specifying different amounts of PTO for various years of service)[32].) There is no evidence that Respondent notified the Union or afforded an opportunity to bargain before changing its PTO policy. (See Tr. 1222–1224, 1701–1702 (noting that the Union did not learn about the new PTO policy until May 2021); GC Exhs. 94 (p. 1), 99.)

DISCUSSION AND ANALYSIS: "CA" CASES

A. Credibility Findings

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. Credibility findings need not be all-or-nothing propositions — indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Farm Fresh Co., Target One, LLC*, 361 NLRB 848, 860 (2014) (noting that an administrative law judge may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent). To the extent that credibility issues arose in this case, I have stated my credibility findings in the Findings of Fact above.

B. Did Respondent Violate the Act when it Unilaterally Implemented its Last, Best and Final Contract Offer on May 1, 2020?

[32] The expired agreement specifies the following amounts of PTO depending on years of service: 1 year of service (5 days); 2 years (7 days); 3 years (8 days) 4 to 5 years (12 days); 6 years (13 days); 7 years (15 days); 8 to 15 years (19 days); 16 to 20 years (24 days); and 21 or more years (29 days). (GC Exh. 2 (Art. 12, Sec. 1).)

1. Complaint allegations

The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) of the Act by, since on or about May 1, 2020, failing to continue in effect the terms and conditions of the expired collective-bargaining agreement (CBA) through the following actions without the Union's consent and without reaching a valid impasse:

(a) failing and/or refusing to pay bargaining unit employees the wage rates established in the CBA;

(b) giving itself the ability to limit contributions to the unit employees' pension plan;

(c) failing and/or refusing to make contributions to Unit employees' health and welfare plan managed by OPET;

(d) limiting the Union's right to access its facility; and

(e) failing and/or refusing to continue its dues checkoff practice.

2. Applicable legal standard

Under the unilateral change doctrine, an employer's duty to bargain under the Act includes the obligation to refrain from changing its employees' terms and conditions of employment without first bargaining to impasse with the employees' collective-bargaining representative concerning the contemplated changes.[33] The Act prohibits employers from taking unilateral action regarding mandatory subjects of bargaining such as rates of pay, wages, hours of employment and other conditions of employment. An employer's regular and longstanding practices that are neither random nor intermittent become terms and conditions of employment even if those practices are not required by a collective-bargaining agreement. The party asserting the existence of a past practice bears the burden of proof on the issue and must show that the practice occurred with such regularity and frequency that employees could reasonably expect the practice to continue or reoccur on a regular and consistent basis. *Raytheon Network Centric Systems*, 365 NLRB No. 161, slip op. at 5, 8, 16, 20 (2017); *Howard Industries, Inc.*, 365 NLRB No. 4, slip op. at 3–4 (2016).

On the issue of whether the parties bargained to an impasse, the Board defines a bargaining impasse as the point in time of negotiations when the parties are warranted in assuming that further bargaining would be futile because both parties believe they are at the end of their rope. The question of whether an impasse exists is a matter of judgment based on the following factors: the bargaining history; the good faith of the parties in negotiations; the length of the negotiations; the importance of the issue or issues as to which there is disagreement; and the contemporaneous understanding of the parties as to the state of negotiations. The party

[33] Separate and apart from the unilateral change doctrine, an employer also has a "duty to engage in bargaining regarding any and all mandatory bargaining subjects *upon the union's request* to bargain," unless an exception to that duty applies. *Raytheon Network Centric Systems*, 365 NLRB No. 161, slip op. at 11–12, 16–17, 20 (emphasis in original).

asserting impasse bears the burden of proof on the issue. *Mike-Sell's Potato Chip Co.*, 360 NLRB 131, 139 (2014), enfd. 807 F.3d 318 (D.C. Cir. 2015).

If an employer makes a unilateral change to a term and condition of employment, it may still assert certain defenses. For example, the employer may assert that the change: did not alter the status quo (e.g., because the change in question was part of a regular and consistent past pattern); did not involve a mandatory subject of bargaining; was not material, substantial and significant; or did not vary in kind or degree from what has been customary in the past. *MV Transportation, Inc.*, 368 NLRB No. 66, slip op. at 11 (2019); *Raytheon Network Centric Systems*, 365 NLRB No. 161, slip op. at 5, 8, 16, 20. In addition, the employer may assert that the contractual language privileged it to make the disputed change without further bargaining (the "contract coverage" defense). Under the contract coverage defense, the Board will determine whether the parties' collective-bargaining agreement covers the disputed unilateral change. In making that determination, the Board will give effect to the plain meaning of the relevant contractual language, applying ordinary principles of contract interpretation, and the Board will find that the agreement covers the challenged unilateral act if the act falls within the compass or scope of contract language that grants the employer the right to act unilaterally. Since a collective-bargaining agreement establishes principles that govern a myriad of fact patterns, the Board will not require (as a prerequisite to the defense) that the agreement specifically mention, refer to or address the employer decision at issue. If the contract coverage defense is not met, then the Board will determine whether the union waived its right to bargain about a challenged unilateral change. *MV Transportation, Inc.*, 368 NLRB No. 66, slip op. at 11–12.

3. Analysis – dues checkoff

The evidentiary record shows that on April 9, 2020, Respondent unilaterally stopped the dues-checkoff practice under the expired collective-bargaining agreement. (FOF, Sec. II(N)(1).) A few months before Respondent took that action, the Board held that a dues-checkoff provision is created by the contract and is enforceable under the Act "only for the duration of the contractual obligation created by the parties." Because of that status, the Board found that there is no obligation under the Act to continue dues checkoff after the contract expires. *Valley Hospital Medical Center, Inc., d/b/a Valley Hospital Medical Center*, 368 NLRB No. 139, slip op. at 1 (2019), petition for review granted and case remanded, 840 Fed. Appx. 134 (9th Cir. 2020) (remanding for the Board to adequately explain its dues-checkoff rule, but permitting the rule to stand while the Board considers and works on supplementing its reasoning).

Given that precedent, Respondent acted lawfully when it stopped dues checkoff on April 9, 2020, more than a year after the collective-bargaining agreement expired. I therefore recommend that the complaint allegation regarding dues checkoff be dismissed.[34]

4. Analysis – unilateral changes in the implemented final offer

[34] To the extent that the General Counsel contends that the controlling precedent on this issue should be overturned (see GC Posttrial Br. at 102–103), the General Counsel may present those arguments directly to the Board.

There is no dispute that on May 1, 2020, Respondent unilaterally implemented its final offer. In taking that step, Respondent: changed wage rates from what they were under the expired agreement; replaced the formula for matching employee contributions to Respondent's 401(k) plan with a more general requirement that Respondent provide no less than a 230-percent match to employee contributions in an amount defined in the 401(k) plan; stopped paying for employee health care under the OPET plan; and set new requirements and limitations that applied when union representatives sought access to Respondent's facility.[35] (FOF, Sec. II(Q).)

Respondent maintains that it was permitted to implement its final offer because the parties were at impasse after bargaining on March 30, 2020. (See R. Posttrial Br. at 142–143.) I disagree. In their March 10 and 30 bargaining sessions (the sixth and seventh bargaining sessions overall), the parties made significant progress in some challenging areas, particularly regarding health care. Indeed, early in the March 30 bargaining session, the Union agreed to Respondent's request that bargaining unit employees move from the OPET health care plan to Respondent's plan. That move, however, opened up some new questions that needed to be cleared up through additional bargaining, including when the move to Respondent's health care plan should take effect (e.g., on May 1 or in the month after the contract was ratified), the number of hours that employees would need to work to be eligible for health insurance coverage under Respondent's plan (80 hours per month vs. approximately 129 hours per month), and whether some of the expected savings that Respondent would garner from the health care plan switch should be allocated to other parts of the contract (such as higher wage increases). In addition, the parties still had room to negotiate on wages, as on March 30 the Union for the first time offered a wage freeze for the first year of the contract, but in exchange for higher wage increases in the latter years of the contract.[36] The Union actually reduced its proposed wage increases towards the end of bargaining on March 30, thereby indicating that it had not yet reached the end of its rope on the issue. (FOF, Sec. II(K), (M)(1)-(2).) Given the state of negotiations, the parties were not at impasse when Respondent decided to unilaterally implement its last and final offer on May 1, 2020. See *Wilkes-Barre Behavioral Hospital Co., LLC d/b/a First Hospital Wyoming Valley*, 370 NLRB No. 17, slip op. at 15, 17 (2020) (finding no impasse where the union made concessions and indicated that it had additional flexibility in negotiations); *Stein Industries, Inc.*, 365 NLRB No. 31, slip op. at 3–5 (2017) (same); *Royal Motor Sales*, 329 NLRB 760, 772 (1999) (finding that the parties were not at impasse, in part because one of the union's proposals demonstrated flexibility and significant movement, and thus raised the possibility that further negotiation might produce other or more extended concessions), enfd. 2 Fed. Appx. 1 (D.C. Cir. 2001).

[35] Regarding union access to the facility, I did not find that Respondent had an established past practice of requiring union representatives to be escorted by a member of management (or their designee) when visiting the production or warehouse areas of the facility. (FOF, Sec. II(H)(2).) Thus, Respondent misses the mark with its argument that it did not change its union access policy because the policy mirrored past practice. (See R. Posttrial Br. at 183–185.)

[36] It appears that due to "sticker shock" at the higher wage increases that the Union proposed for the latter years of the contract, Respondent did not understand that the Union was proposing a lower overall increase to wages (in dollar value) than in previous offers. Since Respondent immediately rejected the Union's March 30, 2020 wage proposal as regressive, the parties never discussed whether the Union's proposed backloaded wage increases, or some variation thereto, might meet Respondent's needs.

I have also considered Respondent's argument that it was permitted to implement its final offer because the Union improperly refused to bargain after March 30, 2020, unless the bargaining session was in person and with a mediator. (See R. Posttrial Br. at 143–158.) As a preliminary matter, I do not find that the Board has recognized a defense that would permit an employer to implement its final offer based on a union's alleged bad-faith bargaining tactics (but in the absence of an impasse). To the contrary, when one party asserts that it may act unilaterally because another party has acted in bad-faith during bargaining, that issue is addressed in the context of evaluating whether the parties have reached a good-faith impasse and whether it would be futile to engage in additional bargaining. See, e.g., *Jefferson Smurfit Corp.*, 311 NLRB 41, 60 (1993) (finding that an employer reasonably concluded that further bargaining would not be fruitful, in part because the union was engaging in conduct that was preventing the parties from reaching an agreement or a genuine impasse); *M & M Contractors*, 262 NLRB 1472, 1472 (1982) (same, where the union "over a period of 7 months had clearly manifested its aversion to bargaining" with the employer), petition for review denied, 707 F.2d 516 (9th Cir. 1983); see also *Wilkes-Barre Behavioral Hospital Co., LLC d/b/a First Hospital Wyoming Valley*, 370 NLRB No. 17, slip op. at 17–18 (rejecting a similar defense to an allegation that the employer unlawfully implemented its final offer).)

Even if we consider the merits of Respondent's proffered defense related to the Union's insistence on in person bargaining, however, the defense fails on the merits because I do not find that the Union engaged in any misconduct that prevented the parties from reaching an agreement or a good-faith impasse. In Respondent's view, the Union's insistence that the next bargaining session be in person with a mediator was simply a delay tactic since the Covid–19 pandemic precluded such an arrangement. I disagree with that characterization. First, I note that Respondent declared impasse in the same March 30, 2020 email conversation in which the Union proposed in person bargaining with the mediator. (See FOF, Sec. II(M)(2).) Given that timing, it is a stretch for Respondent to assert that the Union's mere suggestion of in person bargaining was tantamount to a refusal to bargain and warranted a declaration of impasse. Second, in March and April 2020, the Covid–19 pandemic presented new challenges for both the Union and Respondent. The stay-at-home orders in Oregon were evolving, with (for example) school closures initially ordered for 15 days at the end of March 2020, and then extended to April 28, 2020. With that backdrop, the Union's position was that the parties should schedule an in-person bargaining session with the mediator for the first available date. Given the uncertainty at the time about just how long the Covid–19 pandemic would persist, I do not find that the Union's position was unreasonable or designed to frustrate reaching an agreement.[37] (FOF, Sec. II(L, M(2), N(1)-(2), Q(1)).)

Since the parties were not at a valid impasse and no other defenses apply, I find that Respondent violated Section 8(a)(5) and (1) of the Act, within the meaning of Section 8(d), when Respondent unilaterally implemented its last and final offer on May 1, 2020, and thereby: changed wage rates from what they were under the expired agreement; replaced the formula for matching employee contributions to Respondent's 401(k) plan with a more general requirement that Respondent provide no less than a 230-percent match to employee contributions in an

[37] The Covid–19 pandemic, of course, has persisted well past March/April 2020. For our purposes here, however, the point is that it was not unreasonable in March/April 2020 for the Union to seek an in person bargaining session with a mediator on the first available date.

amount defined in the 401(k) plan;[38] stopped paying for employee health care under the OPET plan; and set new requirements and limitations that applied when union representatives sought access to Respondent's facility.

C. Did Respondent Violate the Act by Making Additional Unilateral Changes to Terms and Conditions of Employment after Implementing its Final Offer on May 1, 2020?

1. Complaint allegations

The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) of the Act, within the meaning of Section 8(d) of the Act, by failing to continue in effect the terms and conditions of the expired collective-bargaining agreement (CBA) through the following actions without the Union's consent and without reaching a valid impasse:

(a) Since on or after May 6, 2020, changing entry level and probationary pay rates established in the CBA;

(b) Since on or about December 24, 2020, changing paid holidays established in the CBA; and

(c) Since on or about January 1, 2021, changing its compensated time off policy established in the CBA.

2. Applicable legal standard

The unilateral change doctrine and legal standard discussed in the preceding section (see Discussion and Analysis, Sec. B(2)) also applies to the allegations addressed here.

3. Analysis

After implementing its last and final offer on May 1, 2020, Respondent continued to make additional unilateral changes to the terms and conditions of employment. First, starting on about May 6, 2020, Respondent began hiring replacement workers at wage rates that exceeded the rates specified in the expired agreement. Specifically, Respondent exempted its new hires in Bracket 3 positions from having to work at the lower Bracket 3A wage rate for 1000 hours or 1 year. Respondent also exempted its new hires from the rule that they only receive 75 percent of their wage rate until they complete their introductory period. (FOF, Sec. II(S)(2).) Second, on September 18, 2020, Respondent notified employees that they would receive 4 new paid holidays between December 24–31, 2020 (the weekdays in that timeframe for which employees normally would have been on duty). (FOF, Sec. II(X)(1).) And third, on September 18, 2020, Respondent notified employees that a new compensated time off policy (a.k.a. PTO policy)

[38] Since Respondent's 401(k) plan is not part of the evidentiary record, it is unclear how much latitude or flexibility this unilateral change provided to Respondent. While I take Respondent's point that it may be a step too far to say, as alleged in the complaint, that Respondent gave itself the ability to limit contributions to the plan (see R. Posttrial Br. at 183), the fact remains that Respondent changed the operative language about matching employee contributions to the plan. Accordingly, I have found the narrower violation stated here regarding the changes to the 401(k) plan.

would take effect on January 1, 2021. Under the new policy, most employees earned a higher amount of compensated time off annually depending on their years of service, and all employees were subject to new rules governing how much compensated time off they could "bank" from year to year (among other differences). (FOF, Sec. II(X)(2).)[39]

Initially, Respondent argues that the complaint allegations concerning these unilateral changes must be dismissed because they are time-barred by the 6–month limitations period in Section 10(b) of the Act and do not qualify for the exception that permits litigation of allegations that are "closely related" to allegations in a prior timely filed charge. (See R. Posttrial Br. at 192–195.) To determine whether an otherwise untimely allegation is sufficiently closely related to a timely allegation to allow it to be added to the complaint, the Board applies the three-prong test set forth in *Redd-I, Inc.*, 290 NLRB 1115 (1988), under which the Board: (1) considers whether the timely and untimely allegations involve the same legal theory; (2) considers whether the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the untimely charge; and (3) "may look" at whether a respondent would raise the same or similar defenses to both the timely and untimely allegations.[40] *Earthgrains Co.*, 351 NLRB 733, 734 (2007); see also *Redd-I*, 290 NLRB at 1116.

Both the General Counsel and Respondent identify the charge in Case 19–CA–260013, filed on May 6, 2020, as the relevant one for the "closely related" analysis. In the charge for that Case, the Union alleged that Respondent "failed and refused to bargain in good faith with the union as the collective-bargaining representative of its employees by making unilateral changes in terms and conditions of employment." The Union listed the following May 1, 2020 changes in the charge: wages; retirement security; health & welfare package; limiting rights of union access; and removal of dues checkoff. (GC Exh. 1(a).) I find that complaint allegations relating to the additional unilateral changes addressed in this section are closely related to the allegations in the charge in Case 19–CA–260013. The unilateral change complaint allegations arise from the same legal theory – that Respondent changed employee terms and conditions of employment without first notifying the Union and bargaining to impasse. The allegations also arise from the same factual situation and sequence of events. While Respondent maintains that the unilateral change dispute only extends to May 1, 2020, the date on which Respondent implemented its final offer, I find that the additional unilateral changes are closely related because they arise from the same sequence of events (i.e., after Respondent declared impasse, it made a series of unlawful unilateral changes to working conditions as part of an ongoing course of conduct). I therefore

[39] I note that I have found September 18, 2020 to be the date that Respondent unilaterally changed paid holidays and its compensated time off policy because that is when Respondent announced them to employees. (FOF, Sec. II(X)(1)-(2).) The changes were a fait accompli when Respondent made the announcement. Cf. *Brannan Sand & Gravel Co.*, 314 NLRB 282, 282 (1994) (finding that the employer's changes to its health plan were a fait accompli when the union was notified, in part because the employer had already announced the changes to its employees).

[40] In some cases, the Board has indicated that "closely related" complaint allegations traditionally must also have occurred within 6 months before the filing of the timely unfair labor practice charge. See, e.g., *Redd-I*, 290 NLRB at 1116 (discussing *NLRB v. Dinion Coil Co.*, 201 F.2d 484, 491 (2d Cir. 1952).) As I understand it, this rule is intended to limit aged allegations from finding their way into a complaint and does not bar "closely related" complaint allegations that arise *after* an unfair labor practice charge has been filed (such as the complaint allegations at issue here).

find that the complaint allegations about the additional unilateral changes are procedurally valid, and I accordingly turn to the merits of those allegations.[41]

On the issue of wage increases that began in May 2020, while the strike was in progress, the Board has recognized that an employer generally "may lawfully hire replacements in the event of a strike and unilaterally set the terms and conditions of employment for those replacements." An employer in that situation may run afoul of the Act, however, if it is shown that the employer exercised its right in a manner designed to undermine the Union. *Beverly Health & Rehabilitation Services*, 335 NLRB 635, 638 (2001) (finding that an employer violated the Act by advertising higher wages for replacement workers because the ads threatened yet another unilateral action if employees engaged in a strike), enfd. in pertinent part, 317 F.3d 316 (D.C. Cir. 2003); see also *Harding Glass Co.*, 316 NLRB 985, 985 (1995), enfd. in pertinent part, 80 F.3d 7 (1st Cir. 1996). Here, I find that the General Counsel fell short with its proof, as the General Counsel demonstrated that Respondent unilaterally exempted replacement workers from lower introductory wages, but did not present additional evidence to demonstrate that the lower wage exemptions were designed to further undermine the Union. Accordingly, I recommend that the complaint allegation that Respondent unlawfully paid higher wages (to replacement workers) on and after May 6, 2020 be dismissed.

By contrast, I find that Respondent did violate the Act when, on September 18, 2020, it announced decisions to grant employees 4 additional paid holidays (to occur between December 24-31, 2020) and implement a new compensated time off policy (to take effect on January 1, 2021). By that point, the strike was over and Respondent was obligated to notify and bargain with the Union about these changes to the terms and conditions of employment. Respondent did not offer a viable defense about changing its compensated time off policy.[42] As for the additional paid holidays, I do not find merit to Respondent's arguments that it was privileged to grant the paid holidays as part of an established past practice of granting bonuses and other "extras." (See R. Posttrial Br. at 195.) The evidentiary record does not show that Respondent had an established past practice of providing bonuses or extras such as paid holidays; at most, those types of benefits arose sporadically, such as when Respondent paid a one-time bonus to employees following the Pendleton Whisky sale. (See FOF, Section II(X)(1).) I also do not find merit to Respondent's argument that the Union waived its bargaining rights after receiving notice about the paid holidays. (See R. Posttrial Br. at 196–197.) The evidentiary record shows that Respondent mentioned the possibility of granting additional paid holidays when it presented a proposed strike settlement to the Union in August 2020. The parties never agreed on that

[41] My conclusion remains the same even if I consider whether Respondent would raise the same or similar defenses to the new allegations. In the big picture, Respondent's defenses are similar insofar as for each alleged unilateral change, Respondent has offered a justification for why the unilateral change was permissible (e.g., impasse, past practice). While the specific justifications vary, I do not find the variations to be so great that they undermine the factual and legal similarities of each of the unilateral change allegations at issue.

[42] Respondent maintained that the complaint allegation regarding compensated time off relates to the time off policy that Respondent applied to replacement workers in summer 2020. (See R. Posttrial Br. at 192, 195 (arguing that changes to the compensated time off policy were permissible under the right to set terms and conditions of employment for replacement workers during a strike).) I do not find merit to that characterization of the complaint allegation, which clearly takes issue with the new compensated time off policy that was announced in September 2020 and took effect in January 2021.

proposal, and there is no evidence that Respondent subsequently notified the Union that it planned to offer additional paid holidays.[43] (FOF, Sec. II(X)(1).) Under those circumstances, I cannot find that the Union received notice of the change or that the Union waived its right to bargain over the issue.

In sum, I find that Respondent violated Section 8(a)(5) and (1) of the Act, within the meaning of Section 8(d), by failing to continue in effect the terms and conditions of the expired collective-bargaining agreement (CBA) through the following actions without the Union's consent and without reaching a valid impasse: (a) on about September 18, 2020, changing its paid holidays by granting 4 additional paid holidays between December 24–31, 2020; and (b) on about September 18, 2020, changing its compensated time off policy by announcing a new compensated time off policy, effective on January 1, 2021.

D. Was the Strike an Unfair Labor Practice Strike?

1. Applicable legal standard

It is well established that a work stoppage is considered an unfair labor practice strike if it is motivated, at least in part, by the employer's unfair labor practices, even if economic reasons for the strike were more important than the unfair labor practice activity. It is not sufficient, however, merely to show that the unfair labor practices preceded the strike. Rather, there must be a causal connection between the two events. In sum, the unfair labor practices must have contributed to the employees' decision to strike. *Golden Stevedoring Co.*, 335 NLRB 410, 411 (2001); see also *Executive Management Services*, 355 NLRB 185, 185 fn. 5 (2010) (citing *Golden Stevedoring Co.*).

2. Analysis

The evidentiary record shows that the Union obtained preliminary authorization to call a strike in August 2019. The Union, however, did not call a strike at that time. Instead, bargaining unit members continued to work and bargaining continued through March 30, 2020, when Respondent prematurely declared impasse and stated its intent to implement its final contract offer on May 1. In late April 2020, bargaining unit members voted to go on strike if Respondent followed through with its plan to implement its final offer. Respondent subsequently implemented its final offer on May 1, in the process making several unlawful unilateral changes to terms and conditions of employment, including changes to wages and health care. Bargaining unit members, with the Union's support, then began their strike on May 6, 2020, largely in

[43] The Board's decision in *Citizens National Bank of Willmar*, 245 NLRB 389 (1979), enfd. 644 F.2d 39 (D.C. Cir. 1981) (cited by Respondent) is distinguishable. In that case, the union and employer spoke about new scheduling rule during a bargaining session, and the employer took the position that the change, which had just taken effect, was consistent with past practice. The union then filed an unfair labor practice charge without requesting that the employer bargain or rescind the change. The Board agreed that the ensuing complaint allegation should be dismissed because the union failed to exercise its right to demand bargaining. Id. at 389–390. Here, by contrast, Respondent did not notify the Union that it was granting additional paid holidays (the passing reference to the issue during August 2020 strike settlement talks was, at best, indefinite); therefore, nothing prompted the Union to act on its bargaining rights, and I cannot find that the Union waived those rights.

protest of Respondent's decision to unilaterally implement its final offer. (FOF, Sec. II(H)(1), (M), (O), (P)(2), (Q)-(R).)

Based on the evidentiary record, I find that the strike was an unfair labor practice strike from the start, on May 6, 2020. As noted above, I have found that Respondent violated the Act when, in connection with implementing its final offer, it unilaterally changed various working conditions on May 1, 2020. (See Discussion and Analysis, Sec. B(4), supra.) Those unfair labor practices in large part caused the strike, as bargaining unit members began the strike in protest of Respondent's decision to unilaterally impose its final offer instead of continuing to bargain with the Union. Accordingly, the 25 strikers are unfair labor practice strikers and are entitled to the legal protections that come with that status.

E. Did Respondent Violate the Act when it Stated, During the Strike, that the Strikers Could Be or Had Been Permanently Replaced?

1. Complaint allegations

The General Counsel alleges that on about June 30, 2020, while employees were engaged in an unfair labor practices strike, Respondent stated that it had permanently replaced the strikers, in violation of Section 8(a)(3) and (1) of the Act.

The General Counsel also alleges that on about July 30, 2020, while employees were engaged in an unfair labor practices strike, Respondent posted a statement on its website that it had permanently replaced the strikers, in violation of Section 8(a)(3) and (1) of the Act.

2. Applicable legal standard

Section 8(a)(1) of the Act makes it unlawful for an employer (via statements, conduct, or adverse employment action such as discipline or discharge) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. The test for evaluating whether an employer's conduct or statements violate Section 8(a)(1) of the Act is whether the statements or conduct have a reasonable tendency to interfere with, restrain or coerce union or protected activities. *Farm Fresh Company, Target One, LLC*, 361 NLRB at 860 (noting that the employer's subjective motive for its action is irrelevant); *Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB 1339, 1339 fn. 3 (2000).

Notably, telling strikers that they have been permanently replaced can constitute an unlawful termination of the strikers' employment in violation of Section 8(a)(3) and (1) of the Act, particularly when the statement is false (as to economic strikers who may wish to return to unoccupied jobs after the strike) or when the strikers are engaged in an unfair labor practice strike and have a right to reinstatement after unconditionally offering to return to work. *Citizens Publishing Co.*, 331 NLRB 1622, 1622–1623 & fn. 2 (2000) (finding that employer discharged unfair labor practice strikers on the date that the employer stated that the strikers were permanently replaced), enfd. 263 F.3d 224 (3d Cir. 2001); *American Linen Supply Co.*, 297 NLRB 137, 137 (1989) (false statement that employer permanently replaced economic strikers was tantamount to a discharge), enfd. 945 F.2d 1428 (8th Cir. 1991); *Mars Sales and Equipment Co.*, 242 NLRB 1097, 1101 (1979) (same), enfd. in pertinent part, 626 F.2d 567 (7th Cir. 1980).

3. Analysis

There is no dispute that Respondent made the following two statements about hiring replacement workers during the strike:

> June 30, 2020 (through Mitchell): Over the last fifteen months we've tried very hard to inform them of, you know, the repercussions of a strike. We told them that they could be permanently replaced if we are able to find new employees. We feel like they had all of the information before they made the decision to walk out.
>
> July 30, 2020 (website posting): HRD has [] hired 21 permanent replacement workers to fill the 25 open positions left by the striking union members. Once the striking employees agree to return to work, if they are in good standing and there are open positions, they will be reinstated. If there is not an open position, they will be placed on a list and will be called back to work once there is an open position.

(FOF, Sec. II(S)(4).)

I find that Respondent violated Section 8(a)(1) of the Act when it made the two statements. Since the bargaining unit members were engaged in an unfair labor practice strike, they could not be permanently replaced and were entitled to immediate reinstatement upon making an unconditional offer to return to work. In that context, Respondent's statements had a reasonable tendency to interfere with the strikers' union activities because the statements unlawfully warned strikers that their jobs were at risk regardless of their status as unfair labor practice strikers. See *Stahl Specialty Co.*, 364 NLRB 635, 635 fn. 1 (2016).

I also find that Respondent, through its July 30, 2020 statement, unlawfully discharged all 25 of the unfair labor practice strikers.[44] In that statement, Respondent explicitly stated that 21 out of 25 strikers had been permanently replaced, and added that the strikers could only be reinstated if there were open positions. Since the strikers were unfair labor practice strikers who retained the right to immediate reinstatement, Respondent's announcement was tantamount to a discharge on the day that Respondent made it and violated Section 8(a)(3) and (1) of the Act.[45]

[44] Respondent's statement on June 30 is different in that it only communicated the possibility that the strikers could be permanently replaced. While that message was coercive and violated Section 8(a)(1) of the Act, it did not violate Section 8(a)(3) because Respondent did not say that any strikers in fact had been permanently replaced. Accordingly, I recommend that this aspect of the complaint allegation regarding the June 30, 2020 statement be dismissed.

[45] I have considered the fact that in its July 30 statement, Respondent only indicated that 21 out of 25 of the strikers had been permanently replaced. In making that statement, however, Respondent did not indicate which 4 strikers' jobs had not yet been filled, and implied that additional permanent replacements could be forthcoming. In my view, Respondent's message was that all strikers would likely be permanently replaced—indeed, 84 percent of the strikers were already replaced, and the remaining (unidentified) few would likely join them in that status. To the extent that Respondent left some ambiguity about which strikers had not yet been permanently replaced, that ambiguity is chargeable to Respondent.

F. Did Respondent Violate the Act when it Refused to Reinstate the Unfair Labor Practice Strikers after Their Unconditional Offer to Return to Work?

1. Complaint allegations

The General Counsel alleges, as an alternative unlawful discharge theory, that Respondent violated Section 8(a)(3) and (1) of the Act when, on about August 31, 2020, it failed and refused to reinstate the 25 unfair labor practice strikers to their former positions of employment after they made a written unconditional offer to return to work.

2. Applicable legal standard

It is well established that employees striking in protest of an employer's unfair labor practices are entitled, absent some contractual or statutory provision to the contrary, to unconditional reinstatement with back pay even if replacements for them have been made. *NLRB v. International Van Lines*, 409 U.S. 48, 50–51 (1972); see also *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (1956).

3. Analysis

The evidence shows that on August 27, 2020, the Union sent a letter to Respondent to communicate that all 25 strikers were making an unconditional offer to return to work in the morning on September 1, 2020. Respondent rejected that offer, asserting that the strike was an economic strike and that all positions at the facility were filled with permanent replacement employees. Respondent then placed 23 of the strikers on a preferential rehire list (Respondent discharged the 2 remaining strikers, Marquez and Viramontes, for alleged misconduct during the strike). (FOF, Sec. II(V), (W)(1).)

Since the 25 strikers were engaged in an unfair labor practice strike and made an unconditional offer to return to work, Respondent was obligated to immediately reinstate them with back pay. When Respondent refused to do so on September 1, 2020 (the date that the strikers identified for their return to work), Respondent violated Section 8(a)(3) and (1) of the Act.

G. Did Respondent Violate the Act when it Discharged Marquez and Viramontes for Alleged Strike Misconduct?

1. Complaint allegations

The General Counsel alleges that on about September 1, 2020, Respondent discharged employees Ismael Marquez and Jaime Viramontes because they assisted the Union and engaged in Union and/or protected concerted activities, and to discourage employees from engaging in those activities.

2. Applicable legal standard

For the allegations in this case, I find that the appropriate legal standard is set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981). The General Counsel must make an initial showing that (1) the employee engaged in Section 7 activity, (2) the employer knew of that activity, and (3) the employer had animus against the Section 7 activity, which must be proven with evidence sufficient to establish a causal relationship between the discipline and the Section 7 activity. If the General Counsel has made its initial case, the burden of persuasion shifts to the employer to prove it would have taken the same action even in the absence of the Section 7 activity. A respondent's defense does not fail simply because not all the evidence supports its defense or because some evidence tends to refute it. Ultimately, the General Counsel retains the burden of proving discrimination. *General Motors LLC*, 369 NLRB No. 127, slip op. at 1–2 (2020) (overruling cases that applied "setting-specific" standards aimed at deciding whether an employee has lost the Act's protection due to alleged misconduct); *Farm Fresh Co., Target One, LLC*, 361 NLRB at 861.[46]

Proof of discriminatory motivation (animus) can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole. Circumstantial evidence of discriminatory motivation may include evidence of: suspicious timing; false or shifting reasons provided for the adverse employment action; failure to conduct a meaningful investigation of alleged employee misconduct; departures from past practices; tolerance of behavior for which the employee was allegedly fired; and/or disparate treatment of the employee. See *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 4, 8 (2019); *Medic One, Inc.*, 331 NLRB 464, 475 (2000).

3. Analysis – Marquez

[46] The General Counsel asserts that I should apply the legal standard set forth in *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964). (See GC Posttrial Br. at 109 (also suggesting, in the alternative, that the *Wright Line* standard should apply).) The *Burnup & Sims* standard survives notwithstanding the Board's decision in *General Motors* but applies only when it is shown that the employer discharged the employee for an alleged act of misconduct for which the employee was not, in fact, guilty. See *NLRB v. Burnup & Sims*, 379 U.S. 21, 23 (1964); *General Motors LLC*, 370 NLRB No. 127, slip op. at 10 fn. 27 (stating that the framework in *General Motors* "presupposes that the employee actually engaged in the misconduct"). I find that the *Burnup & Sims* standard is a poor fit here, where there are questions about whether Marquez and Viramontes engaged in some of the alleged misconduct that Respondent cited as the bases for their discharges.

As an aside, I also note that a case could be made that Marquez' and Viramontes' discharges are based on after-acquired evidence. Specifically, since I have found that Respondent discharged all of the strikers through its statement on July 30, 2020, Respondent's decisions to discharge Marquez and Viramontes on September 1, 2020 are based on after-acquired evidence in the form of alleged misconduct that Respondent articulated after Marquez and Viramontes were already shown the proverbial door. See, e.g., *Axelson, Inc.*, 285 NLRB 862, 865–866 (1987) (finding that two strikers were not entitled to reinstatement or full backpay due to misconduct that the employer learned about after the two strikers were discharged). Out of an abundance of caution, I have applied the *Wright Line* standard since it can apply in a variety of circumstances, and because the questions that arise under *Wright Line* dovetail with the after-acquired evidence standard insofar as under either standard, a key question is whether the employer would have discharged the employee for the alleged misconduct even in the absence of the union or protected concerted activity.

The General Counsel made an initial showing that Marquez' union and protected concerted activities were a motivating factor in Respondent's decision to discharge him. Marquez was a striker and Respondent was aware of that fact. Respondent's animus towards Marquez' protected activities is established by Respondent's unlawful statements (on June 30 and July 30, 2020) about permanently replacing the strikers, and also by the fact that Respondent took issue with Marquez' behavior while he was on the picket line (such as appearing to get in Mitchell's way as she drove past the picket line and, while picketing, temporarily delaying a truck from entering the facility). (FOF, Sec. II(T).)

The critical issue, then, is whether Respondent can prove its affirmative defense that it would have discharged Marquez even in the absence of his union and protected concerted activities. As its defense, Respondent asserts that Marquez engaged in a range of misconduct that warranted discharge when viewed as a whole, including: striking Cortes while she was assisting a truck through the picket line; harassing Cortes and Campbell because of their sexual orientation (by saying "Fucking dyke!" and making an obscene gesture); getting in the way of Mitchell's car as she drove out of the parking lot; showing his middle finger to Mitchell; and interfering with a truck driver. (See R. Posttrial Br. at 171–172; FOF, Sec. II(W)(2) (Marquez' termination letter and corrective action report).)

Respondent's affirmative defense fails because the justifications for Marquez' discharge do not hold up to scrutiny. First, Respondent departed from its usual practices and did not investigate the alleged misconduct. (FOF, Sec. II(T), (W)(2), (4).) Respondent did not interview Marquez about any of the alleged misconduct, and also did not interview any other individuals (e.g., other picketers, security staff) who were present at the time of the alleged incidents. This created an echo chamber in which the uninvestigated allegations against Marquez received full and unquestioned credit, sometimes resulting in inflated characterizations of what Marquez allegedly did (e.g., the shoulder/arm bumping incident with Cortes became Marquez "physically [striking] an employee while walking on the picket line" in Marquez' termination letter). Furthermore, Respondent's failure to investigate shows that Respondent was more interested in discharging Marquez than it was in getting to the bottom of whether Marquez engaged in misconduct. See *Manor Care Health Services – Easton*, 356 NLRB 202, 204 (2010) (noting that the General Counsel may demonstrate an employer's motive to discriminate by showing that the employer failed to investigate whether an employee engaged in alleged misconduct that led to the employee being disciplined or discharged), enfd., 661 F.3d 1139 (D.C. Cir. 2011); *Medic One, Inc.*, 331 NLRB at 475 (same).[47]

[47] Respondent asserts that an employer may form an honest belief that a striker engaged in misconduct without attempting to get the striker's side of the story. (See R. Posttrial Br. at 174–175.) That may be possible in some cases, particularly if the investigation is otherwise thorough. See, e.g., *Giddings & Lewis, Inc.*, 240 NLRB 441, 447–448 (1979) (finding that the employer did not interview strikers about alleged misconduct but formed an honest belief that they engaged in misconduct by interviewing eyewitnesses, reviewing video evidence of the incidents, and reviewing various oral and written reports). The fact remains, however, that an unduly narrow investigation may demonstrate that the employer was motivated to discriminate against the employee. That is what I find here, as Respondent's limited investigations inevitably led it to conclude (unreasonably) that Marquez and Viramontes engaged in strike misconduct.

Second, Respondent delayed weeks (and sometimes months) in raising concerns about Marquez' conduct. (FOF, Sec. II(T), (W)(2).) That delay suggests that Respondent did not believe that the conduct warranted action. Further, the delay denied Marquez the opportunity to respond to the alleged misconduct in a timely manner (i.e., when he and other witnesses would have clearer memories) and, to the extent appropriate, change his behavior going forward.

Third, Respondent did not show that discharge would be appropriate under its policies and practices for Marquez' alleged misconduct. It was common for Respondent's employees to use profanity in the workplace. There is no evidence that Respondent took disciplinary action against employees for using profane language or gestures (like showing a middle finger) when in casual conversation or in conflict with another employee. Similarly, there is no evidence that Respondent ever disciplined (much less discharged) an employee for bumping into a coworker. The only potential comparison was provided by Viramontes, who testified that he and a coworker received written warnings after a dispute in which the coworker pushed Viramontes. There is no evidence that Respondent ever took disciplinary action against an employee for a safety violation such as getting in the way of a delivery truck. And, the evidentiary record does not show how Respondent has handled comparable incidents of alleged harassment (based on sexual orientation or any other protected status). (FOF, Sec. II(W)(2), (4) (noting that Respondent's sexual harassment policy contemplates all types of corrective action up to discharge when violations occur).) Due to these shortcomings, the proposition that Respondent would have discharged Marquez for the alleged misconduct (even if it occurred) is speculative.

In light of the General Counsel's showing of discrimination and the failure of Respondent's affirmative defense,[48] I find that the General Counsel demonstrated that Respondent violated Section 8(a)(3) and (1) of the Act by discharging Marquez on about September 1, 2020, because of his union and protected concerted activities.

4. Analysis – Viramontes

As it did with Marquez, the General Counsel made an initial showing that Viramontes' union and protected concerted activities were a motivating factor in Respondent's decision to discharge him. Viramontes was a striker and Respondent was aware of that fact. Respondent's animus towards Viramontes' protected activities is established by Respondent's unlawful statements (on June 30 and July 30, 2020) about permanently replacing the strikers, and also by the fact that Respondent took issue with Viramontes' behavior while he was on the picket line (such as yelling at Mitchell to ask, "when are you HRD scumbags going to get your shit together," or yelling at replacement workers). (FOF, Sec. II(U).)

As its affirmative defense that it would have discharged Viramontes even in the absence of his union activities, Respondent asserts that Viramontes engaged in a range of misconduct that warranted discharge when viewed as a whole. That alleged misconduct includes: threatening two replacement workers by stating that he knew where they lived; striking a replacement worker's car with a picket sign; and using his picket sign to block the view of a truck driver

[48] In making this finding, I do not condone any misconduct that Marquez may have engaged in during the strike. I only find that Respondent failed to prove its affirmative defense based on the alleged misconduct.

entering the facility. (See R. Posttrial Br. at 172; FOF, Sec. II(W)(3) (Viramontes' termination letter).)

Respondent's affirmative defense for its discharge of Viramontes fails for the same reasons that the defense failed for Marquez. Once again, Respondent departed from its usual practices and did not investigate the alleged misconduct by interviewing Viramontes or any other individuals who were present at the time of the alleged incidents. (FOF, Sec. II(U), (W)(3)-(4).) Thus, the uninvestigated allegations against Viramontes received full and unquestioned credit, sometimes resulting in inflated characterizations of what Viramontes allegedly did (e.g., an incident in which Viramontes allegedly brushed a replacement worker's car with his picket sign evolved into an allegation that Viramontes "struck the vehicle of an employee with a picket sign," which Respondent characterized as a physical act of violence in Viramontes' termination letter).[49]

Second, Respondent delayed weeks (and sometimes months) in raising concerns about Viramontes' conduct (see FOF, Sec. II(U), (W)(3)), thereby suggesting that Respondent did not believe that the conduct warranted action and denying Viramontes the opportunity to respond to the alleged misconduct in a timely manner and, if appropriate, change his behavior going forward.

Third, Respondent did not show that discharge would be appropriate under its policies and practices for Viramontes' alleged misconduct. There is no evidence that Respondent ever discharged an employee for threatening to come to a coworker's house or otherwise implying an intent to physically fight a coworker. Indeed, when Viramontes was involved in a dispute in which a coworker pushed him, Respondent only issued written warnings to Viramontes and his coworker. And, there is no evidence that Respondent ever took disciplinary action against an employee for a safety violation such as blocking the view of a delivery truck. (FOF, Sec. II(W)(3)-(4).) Due to these shortcomings, the proposition that Respondent would have discharged Viramontes for the alleged misconduct (even if it occurred) is speculative.

In light of the General Counsel's showing of discrimination and the failure of Respondent's affirmative defense,[50] I find that the General Counsel demonstrated that Respondent violated Section 8(a)(3) and (1) of the Act by discharging Viramontes on about September 1, 2020 because of his union and protected concerted activities.

ADDITIONAL FINDINGS OF FACT (CASE 19–RD–271944)[51]

[49] Because of his handwriting, Armstrong's incident report appeared to say that Viramontes either "brashed" or "brushed" Armstrong's car with a picket sign. Although Armstrong readily cleared up the ambiguity at trial by stating that he wrote "brushed," (see FOF, Sec. II(U)) there is no evidence that Respondent sought to clear up what Armstrong wrote or meant during any investigation before Viramontes was discharged.

[50] As I noted regarding Marquez, I do not condone any misconduct that Viramontes may have engaged in during the strike. I only find that Respondent failed to prove its affirmative defense based on the alleged misconduct.

[51] Although I have included several citations in this decision to highlight particular testimony or exhibits in the evidentiary record, I emphasize that my findings and conclusions are not based solely on

For Case 19–RD–271944, I incorporate and will consider all of the findings of fact set forth in this decision. I make the following additional findings of fact to further develop the record.

Fall 2020 – Spring 2021: Union Membership and Representation

1. Bargaining unit membership and union support as of September 30, 2020

Following Respondent's decision to not immediately rehire strikers and instead place them on a preferential rehire list, the bargaining unit was composed of 24 employees who were hired as replacement workers and generally performed the same jobs as the discharged strikers.[52] Although all of those workers were eligible to become union members, union support was low among the group. First, there were no shop stewards remaining in the bargaining unit. (CPU Exh. 13; Tr. 1302–1303, 1618–1619, 1870–1871, 1877; see also CPU Exh. 15 (pp. 2–3) (list of employees in bargaining unit positions on May 6, 2020).) Second, in about late August 2020 (after the strikers' August 27 unconditional offer to return to work), 21 employees signed letters addressed to the Union to request that their "full membership status in the union [be] changed immediately to the status of a financial core member" and note that "[i]n electing financial core membership I no longer consider myself bound by the union's constitution and local bylaws." (R. Exh. 152 (pp. 16–36); Tr. 1621, 2173–2178.) And third, in about late September 2020, 11 employees submitted forms to ask Respondent not to disclose their personal contact information to the Union because "[b]ased on the union's threats and harassment towards me and my coworkers, I have a concern for my safety." (R. Exh. 152 (pp. 5–15); Tr. 872, 1277–1278, 1619–1620; see also CPU Exh. 13 (p. 2) (employee roster showing 12 employees with Respondent's facility as their contact address, and Respondent's phone number as their contact phone); Petitioner (P) Exh. 3 (decertification petition that began circulating in June 2020 and had several signatures but had not yet been submitted).)

2. November 2020: Respondent begins rehiring strikers from the preferential rehire list

From late October through November 2020, Respondent sent letters to the following former strikers to recall them to work in bargaining unit positions (but not necessarily their former positions or former pay rates): Susan Bell, Jorge Caldera, Ulises Hernandez-Beltran, Kelly Holmes, Eliseo Lara, Britt Lee, Mark Nelson, and Matt Webber. Respondent contacted the former strikers in order of seniority and based on the positions for which they were qualified. (CPU Exh. 20 (pp. 1–8); Tr. 1685–1686, 1803–1808, 1884–1885; see also Tr. 1271 (noting that none of the former strikers who were rehired were shop stewards), 1687–1689 (indicating that Kelly Holmes declined the offer and Britt Lee did not respond to the offer); CPU Exh. 20 (p. 9) (January 12, 2021 letter recalling Al Russell to a bargaining unit position).)

---

those specific citations, but rather are based on my review and consideration of the entire record for this case.

[52] The strikers held the following bargaining unit positions in early May 2020, before the strike began: blender (2 employees, plus 1 in training); line attendant (13); janitor (1); machine operator (2); mechanic (2); production assistant (1); truck driver (1); and warehouse (3). (CPU Exh. 15 (pp. 2–3).) In September 2020, replacement workers held the following bargaining unit positions: blender (3 in training); line attendant (8 employees); machine operator/line attendant (5); mechanic (2 in training); production assistant (2); truck driver (1); and warehouse (3). (CPU Exh. 13 (p. 2).)

3. Fall 2020 through April 2021: lower union support

By fall 2020, Paul Johnson was serving as the Union's business agent and worked on reaching out to replacement workers about becoming union members (there were no shop stewards working at the facility who could assist in that effort). In about November/December 2020, Johnson attempted to telephone replacement workers for whom he did have contact information but did not receive any responses to voicemail messages. When Johnson and Kale visited the facility in January 2021, they were accompanied by a manager when inside the production area or warehouse (as specified in the implemented offer), and also were available in the facility parking lot to speak to employees as they walked to their cars after their shifts. Johnson observed that most employees did not show any interest in speaking with him, and that the few employees who did stop to talk in the parking lot kept the conversation short. Johnson had a similar experience with replacement workers when he visited the plant three to four times between January and May 2021, and also noted that his plant visits provided the only opportunity to speak with the employees who listed Respondent's address and phone number for their contact information. (Tr. 164–167, 290–292, 1092, 1270–1280, 2187–2188, 2190; GC Exh. 79 (Art. 1, Sec. 4); see also Tr. 155, 160–161, 869–870, 1091–1092 (noting that from August 2018 to the beginning of the strike, Harbert and Leonard were very active as shop stewards at the facility and 100 percent of employees in the bargaining unit were union members), 1089–1091 (explaining that shop stewards assist bargaining unit members with understanding the contract and problem solving when issues arise with management).)[53]

4. Winter/spring 2021: decertification petition and election

On January 28, 2021, Petitioner David Coontz filed a decertification petition that included signatures dated between June 15, 2020 and January 14, 2021. The petition stated, in pertinent part, that "[t]he undersigned employees of Hood River Distillers do not want to be represented by Teamsters Local Union No. 670." (P. Exh. 3; see also Tr. 1295–1296, 2159, 2167–2170, 2181–2182, 2185.)

Following the decertification petition, on March 5, 2021, the Regional Director for Region 19 of the National Labor Relations Board issued a decision directing that a secret ballot election be conducted by mail from March 23 through April 20, 2021. The voting unit consisted of all full-time and regular part-time employees, excluding employees hired for no more than thirty (30) calendar days, office and clerical employees, and guards and supervisors as defined by the Act. (CPU Exh. 7; GC Exh. 1(y) (Exh. A, p. 1).)

The tally of ballots cast in the election showed that of "approximately 45 eligible voters, 12 votes were cast for and 0 votes were cast against the Union, with 27 challenged ballots, a number that is sufficient to affect the results of the election." Specifically, the Union challenged 24 ballots as being cast by temporary replacement employees, while Respondent challenged 2 ballots as being cast by individuals who were terminated from their positions (Marquez and

[53] Johnson observed that a higher number of employees approached him to talk when he visited the facility in May 2021, shortly after the Union obtained interim injunctive relief in federal district court. (Tr. 1092, 1276, 1280–1281, 1887–1888.)

Viramontes) and 1 ballot as being cast by an employee (Tracy Morrison) whose janitor position was eliminated.[54] The Union also filed a timely objection to conduct that it maintains affected the results of the election. (GC Exh. 1(y) (Exh. A, pp. 2–3); CPU Exh. 13 (p. 2) (listing the 24 replacement workers, each of whom was hired during the unfair labor practice strike).)

DISCUSSION AND ANALYSIS: CASE 19–RD–271944

A. Did Hood River Distillers Engage in Conduct that Affected the Outcome of the Election?

1. Summary of objection

The Union filed a timely objection to assert that Respondent engaged in conduct that affected the results of the election. Specifically, the Union contends that Hood River Distillers committed various unfair labor practices that have a causal relationship to the subsequent expression of employee disaffection (in the decertification petition filed on January 28, 2021). (See CPU Posttrial Br. at 3–4.)

2. Analysis

Based on my rulings in this decision, Hood River Distillers committed the following unfair labor practices before the decertification petition was filed on January 28, 2021: (a) between May 1 and September 18, 2020, unilaterally changing wage rates, 401(k) plan terms, employee health insurance, union access rules, paid holidays, and compensated time off without the Union's consent and in the absence of a good-faith impasse; (b) unlawfully stating on June 30, 2020, that unfair labor practice strikers could be permanently replaced; (c) unlawfully stating on July 30, 2020, that 21 unfair labor practice strikers had been permanently replaced, and thereby discharging all 25 unfair labor practice strikers; (d) unlawfully discharging all 25 unfair labor practice strikers on September 1, 2020, after they made an unconditional offer to return to work; and (e) unlawfully discharging Marquez and Viramontes on September 1, 2020 because of their union and protected concerted activities. (Discussion and Analysis – CA Cases, Secs. B(4), C(3), E(3), F(3), G(3)-(4).)

To determine whether a causal relationship exists between unfair labor practices and the subsequent expression of employee disaffection, the Board considers the following factors: (1) the length of time between the unfair labor practices and the withdrawal of recognition or filing of the petition; (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale,

[54] According to Respondent, it eliminated the janitor position (which Morrison held before the strike began) in about July 2020, after deciding that line attendants could perform the cleanup that the janitor previously handled. Respondent did not notify Morrison until May 2021 that the janitor position she held had been eliminated. (Tr. 1281, 1690, 1808–1812, 1871–1873; CPU Exh. 17 (May 12, 2021 letter offering Morrison interim employment in connection with an injunction order, but in a line attendant position because the janitor position has been eliminated).) Although I denied the General Counsel's request to amend the complaint to allege that Respondent violated the Act by unilaterally eliminating the janitor position, the elimination of the janitor position is relevant here because it is the basis for Respondent's challenge to Morrison's ballot.

organizational activities, and membership in the union. *Master Slack Corp.*, 271 NLRB 78, 84 (1984); see also *AT Systems West, Inc.*, 341 NLRB 57, 60 (2004) (noting that the *Master Slack* test is an objective test and thus the subjective state of mind of employees is not relevant).

Viewing the record as a whole, I find a causal relationship between Hood River Distillers' unfair labor practices and the employee disaffection expressed in the decertification petition. First, the unfair labor practices occurred steadily between May 1 and September 2020, such that the violations remained fresh in employees' minds in the 9 months between the first violations and the late-January 2021 filing of the decertification petition. Indeed, the last two unilateral changes (to paid holidays and compensated time off) took effect in late December 2020/early January 2021). Second, the illegal acts had a lasting effect on employees, as the violations communicated to the unfair labor practice strikers that the Union could not protect them and indicated to the replacement workers that they could rely on Hood River Distillers (and not the Union) to act in their best interest. Third, the violations had a reasonable tendency to cause employee disaffection from the Union, as the violations conveyed the message that the Union was ineffective as the representative of employees in the bargaining unit (as demonstrated by the various unlawful unilateral changes that Hood River Distillers made to terms and conditions of employment) and was powerless in its efforts to protect the rights of the employees who went on strike (as indicated by the unlawful discharges of unfair labor practice strikers). And fourth, the evidentiary record shows that union support declined during the relevant time period, as there were no union stewards working in the facility and few, if any, employees expressed interest in communicating with union representatives when they attempted to contact them by telephone in late 2020 and visited the facility in early 2021. (See Additional Findings of Fact (AFOF), Sec. 3.) Since those circumstances did not arise before the unfair labor practices, I infer that the unfair labor practices caused the subsequent loss of union support.[55] See *United Site Services of California, Inc.*, 369 NLRB No. 137, slip op. at 16 (2020) (finding that the employer's unlawful failure to recall/reinstate strikers "would clearly encourage hostility toward the [u]nion for a perceived failure to protect strikers' interests and would have a detrimental impact on employee morale and support for the [u]nion"); *Penn Tank Lines, Inc.*, 336 NLRB 1066, 1068 (2001) (explaining that by unilaterally changing the employees' terms and conditions of employment, the employer minimized the influence of organized bargaining and emphasized to employees that there is no necessity for a collective-bargaining agent).

In light of the causal connection between Hood River Distillers' unfair labor practices and the employee disaffection expressed in the January 2021 decertification petition, I recommend that the Union's objection to the election be sustained and that the decertification petition be dismissed. See *Overnite Transportation Co.*, 333 NLRB 1392, 1392–1393 (2001) (explaining that dismissal is appropriate when a decertification petition is tainted by unfair labor practices that caused the employee disaffection).

[55] In finding a causal connection between Hood River Distillers' unfair labor practices and subsequent employee disaffection, I recognize that the replacement workers had additional reasons to be unhappy with the Union, including the experiences that they had when crossing the picket line. The fact remains, however, that Hood River Distillers committed unfair labor practices that also caused employee disaffection.

B. Ballot Challenges

Although the election objection ruling above warrants dismissing the decertification petition, I will also rule on the Union's and Hood River Distillers' ballot challenges.

1. Summary of challenges

After the election, the Union challenged the ballots of the following 24 individuals on the ground that they were all temporary replacement employees and therefore ineligible to vote in the election: Edgar Alvarez; Preston Armstrong; Bill Byram; James Cole; David Coontz; Juana Cortes; Andrew Culp; Lance Dubaere; Colton Duddles; Stephanie Dousay; Luke Ellsworth; Derek Harbaugh; Aiden Hicks; Alex Johnson; Cory McFall; Samuel Mims; Rosendo Ivan Montoya; Connor Moon; Rick Morris; Sareh Palacios; Erna Roznatovsky; Tyrone Stintzi; John Steven Warkentin; and Miles Wyatt.

Hood River Distillers, meanwhile, challenged the ballots of Ismael Marquez and Jaime Viramontes because they were terminated from their jobs before the election, and challenged the ballot of Tracy Morrison because her job position (janitor) was eliminated before the election.

2. Analysis

I recommend that the Union's 24 ballot challenges be sustained. As noted above, I have found that the strikers were engaged in an unfair labor practice strike. The 24 individuals identified in the Union's ballot challenges were hired as replacements for unfair labor practice strikers and, as such, were not eligible to vote in the election. See *Larand Leisurelies*, 222 NLRB 838, 838 (1976) ("The Board has long held that replacements for unfair labor practice strikers are not eligible to vote in an election."); see also *Cartridge Actuated Services*, 282 NLRB 426, 429 (1986) (sustaining challenges to ballots cast by individuals who were hired as replacements for unfair labor practice strikers); *Tampa Sand & Material Co.*, 137 NLRB 1549, 1549 (1962) (same).[56]

[56] In making this finding, I note that I am not persuaded by Hood River Distiller's argument that some of the replacement workers should be eligible to vote because they would have been hired irrespective of the strike (e.g., because of vacant positions that Hood River Distillers had to fill before the strike, and because Hood River Distillers would have needed to fill the positions of certain strikers who eventually did not return to work). (See R. Posttrial Br. at 190–191.) The Board has not recognized such a defense. Indeed, in *Larand Leisurelies*, the Board indicated that it would not rely on speculation or forecasts to evaluate what might have occurred with hiring had there been no unfair labor practice strike. 222 NLRB at 838. I similarly decline to speculate about hiring here. (See Tr. 1861–1862 (noting that I questioned the validity of this defense during trial but received evidence on the issue as an offer of proof).)

Moreover, to the extent that Hood River Distillers suggests that some of the replacement workers are "additional employees" that it hired to augment its pre-strike workforce, that argument fails on the facts. Hood River Distillers had 25 employees in bargaining unit positions who went on strike on May 6, 2020, and hired the 24 temporary replacement employees during the strike to perform generally the same jobs as the strikers. (See FOF, Sec. II(R); AFOF, Sec. 1.) Under those circumstances, none of the temporary replacement employees can be deemed additional employees who are eligible to vote in the election. See *Larand Leisurelies*, 222 NLRB at 838–839 (rejecting "additional employee" theory and noting that the employer's non-striking employee complement never exceeded its pre-strike employee complement).

I recommend that Hood River Distiller's 3 ballot challenges be overruled. The Board has consistently held that challenges to ballots of wrongfully terminated employees should be overruled. See *David Saxe Productions, LLC and V Theater Group, LLC*, 370 NLRB No. 103, slip op. at 5 (2021) Since I have found that Hood River Distillers unlawfully discharged Marquez, Morrison and Viramontes in 2020, their ballots are valid and should be counted. This is true as to Morrison even if Respondent eliminated her job position,[57] as at a minimum she would still be entitled to reinstatement to a substantially equivalent job position as part of the remedy for being unlawfully discharged.

In light of these findings and recommendations, there are only three additional ballots that warrant counting (the ballots of Marquez, Morrison and Viramontes). Since that number of ballots is insufficient to affect the results of the election insofar as the Union holds a 12 to 0 margin, I recommend a finding that the Union has prevailed in the election if the decertification petition is not dismissed.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. On May 6, 2020, the following 25 employees in the bargaining unit began an unfair labor practice strike: Kelli Bell; Susan G. Bell; James Brown; Aron Butler; Jorge Caldera; Jason Cameron; Maria R. Elisea; Roshanda Halliday; Joshua M. Harbert; Ulises Hernandez-Beltran; Kelly L. Holmes; Angelica Lara; Disenia Lara; Eliseo Lara-Aguila; Britt O. Lee; Michele M. Leonard; Nick Malone; Ismael Marquez; Tracey Morrison; Mark A. Nelson; Wendell M. Russell; Isaac O. Sosa; Jose M. Verduzco; Jaime Viramontes; and Matthew Webber.

4. Respondent violated Section 8(a)(1) of the Act by engaging in the following conduct:

   (a) on about June 30, 2020, stating that unfair labor practice strikers could be permanently replaced; and

   (b) on about July 30, 2020, stating that 21 (out of 25) unfair labor practice strikers had been permanently replaced.

5. Respondent violated Section 8(a)(3) and (1) of the Act by engaging in the following conduct:

   (a) on about July 30, 2020, permanently replacing the following employees while they were engaging in an unfair labor practice strike: Kelli Bell; Susan G. Bell; James Brown; Aron Butler; Jorge Caldera; Jason Cameron; Maria R.

[57] The question of whether Hood River Distillers violated the Act when it eliminated Morrison's job position is still subject to further litigation.

Elisea; Roshanda Halliday; Joshua M. Harbert; Ulises Hernandez-Beltran; Kelly L. Holmes; Angelica Lara; Disenia Lara; Eliseo Lara-Aguila; Britt O. Lee; Michele M. Leonard; Nick Malone; Ismael Marquez; Tracey Morrison; Mark A. Nelson; Wendell M. Russell; Isaac O. Sosa; Jose M. Verduzco; Jaime Viramontes; and Matthew Webber;

(b) in the alternative, on about September 1, 2020, failing and refusing to immediately reinstate the following unfair labor practice strikers after they made an unconditional offer to return to work: Kelli Bell; Susan G. Bell; James Brown; Aron Butler; Jorge Caldera; Jason Cameron; Maria R. Elisea; Roshanda Halliday; Joshua M. Harbert; Ulises Hernandez-Beltran; Kelly L. Holmes; Angelica Lara; Disenia Lara; Eliseo Lara-Aguila; Britt O. Lee; Michele M. Leonard; Nick Malone; Ismael Marquez; Tracey Morrison; Mark A. Nelson; Wendell M. Russell; Isaac O. Sosa; Jose M. Verduzco; Jaime Viramontes; and Matthew Webber; and

(c) on about September 1, 2020, discharging Ismael Marquez and Jaime Viramontes because they engaged in union and protected concerted activities.

6. Respondent violated Section 8(a)(5) and (1) of the Act, within the meaning of Section 8(d) of the Act, by engaging in the following conduct without the Union's consent and in the absence of a good-faith impasse:

(a) on about May 1, 2020, unilaterally changing wage rates;

(b) on about May 1, 2020, unilaterally replacing the formula for matching employee contributions to Respondent's 401(k) plan with a more general requirement that Respondent provide no less than a 230 percent match to employee contributions in an amount defined in the 401(k) plan;

(c) on about May 1, 2020, unilaterally ending payments for employee health care under the OPET plan;

(d) on about May 1, 2020, unilaterally setting new requirements and limitations that applied when union representatives sought access to Respondent's facility;

(e) on about September 18, 2020, unilaterally changing its paid holidays by granting 4 additional paid holidays between December 24–31, 2020; and

(f) on about September 18, 2020, unilaterally changing its compensated time off policy by announcing a new compensated time off policy, effective on January 1, 2021.

7. The unfair labor practices stated in conclusions of law 4–6 above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Regarding Respondent's violation of Section 8(a)(3) and (1) of the Act through its discharge of all 25 unfair labor practice strikers on July 30, 2020, I shall require Respondent to take the steps set forth in this paragraph.[58] I shall require Respondent, if it has not already done so, to reinstate the unfair labor practice strikers immediately to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, discharging if necessary all replacements hired on or after May 6, 2020. If, after such dismissals, there are insufficient positions available for the unfair labor practice strikers, those positions which are available shall be distributed among them without discrimination because of their union membership or activities or participation in the strike, in accordance with seniority or other nondiscriminatory practice used by Respondent. The remaining unfair labor practice strikers for whom no employment is immediately available shall be placed on a preferential hiring list in accordance with seniority or other nondiscriminatory practice used by Respondent, and they shall be reinstated before any other persons are hired. The unfair labor practice strikers who were unlawfully discharged shall be made whole for any loss of earnings or benefits they may have suffered. The make whole remedy shall be computed in accordance with *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010).[59]

Regarding the unlawful (but duplicative) discharges of Ismael Marquez and Jaime Viramontes on September 1, 2020, I shall require Respondent to expunge from its files any references to those unlawful decisions, and within 3 days thereafter notify them that this has been done and that the unlawful decisions will not be used against them in any way.

Upon request of the Union, Respondent shall rescind the unlawful unilateral changes and put into effect the corresponding terms and conditions of employment set forth in the collective-bargaining agreement that expired on February 28, 2019, and shall maintain those terms in effect until the parties have bargained to agreement or a valid impasse, or the Union has agreed to changes. In addition, Respondent must make its employees whole for any loss of earnings and other benefits that resulted from its unlawful unilateral changes. Backpay for these violations

---

[58] Striker James Brown is entitled to reinstatement and backpay notwithstanding some evidence in the record (see, e.g., Tr. 523, 1213, 1687–1688, 1903) that he resigned his employment with Respondent during the strike. Respondent did not plead or litigate this issue as an affirmative defense, and in any event the evidence in the record falls short of unequivocally showing that Brown intended to permanently sever his employment relationship with Respondent. See *Zimmerman Plumbing & Heating Co*., 339 NLRB 1302, 1304 (2003) (noting that the argument that a striker abandoned his or her reinstatement rights is an affirmative defense); *S & M Mfg. Co.*, 165 NLRB 663, 663 (1967) (noting that an employer remains obligated to offer reinstatement to a striker when the strike is over unless there is unequivocal evidence that the striker intended to permanently sever his/her employment relationship).

[59] To the extent that the General Counsel requests consequential damages, I deny the request but note that the issue is currently under review by the Board. See *Thryv, Inc.*, 371 NLRB No. 37 (2021).

shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center,* supra. This includes reimbursing unit employees for any expenses resulting from Respondent's unlawful changes to their contractual benefits (including changes to health insurance benefits), as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), affd. 661 F.2d 940 (9th Cir. 1981), with interest as set forth in *New Horizons* and *Kentucky River Medical Center*, supra. I further recommend that Respondent be ordered to make all contributions to any fund established by the expired collective-bargaining agreement, which contributions the Respondent would have made but for the unlawful unilateral changes, in accordance with *Merryweather Optical Co*., 240 NLRB 1213, 1216 (1979).

In accordance with *King Soopers, Inc.*, 364 NLRB 1153 (2016), enfd. in pertinent part 859 F.3d 23 (D.C. Cir. 2017), Respondent shall compensate any former unfair labor practice strikers for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB 101 (2014), Respondent shall compensate all 25 unfair labor practice strikers (and bargaining unit members) for the adverse tax consequences, if any, of receiving a lump-sum backpay award. In addition, in accordance with *AdvoServ of New Jersey, Inc.,* 363 NLRB 1324 (2016) and *Cascades Containerboard Packaging–Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021), Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order (or such additional time as the Regional Director may allow for good cause shown), file with the Regional Director for Region 19: a report allocating backpay to the appropriate calendar year(s); and a copy of each backpay recipient's corresponding W–2 form(s) reflecting the backpay award. The Regional Director will then assume responsibility for transmitting the report and form(s) to the Social Security Administration at the appropriate time and in the appropriate manner.

The General Counsel has requested, as a special remedy, that I require Respondent to have a responsible management official read the notice aloud to employees at a meeting or meetings convened for that purpose. (GC Posttrial Br. at 144.) The Board has required such a remedy where an employer's misconduct has been sufficiently serious and widespread that reading of the notice will be necessary to enable employees to exercise their Section 7 rights free of coercion. This remedial action is intended to ensure that employees will fully perceive that the respondent and its managers are bound by the requirements of the Act. *Farm Fresh Co., Target One, LLC*, 361 NLRB at 868.

I do not find that a notice-reading remedy is warranted in this case. While Respondent committed several unfair labor practices, most of the violations stem from Respondent's unlawful decision to unilaterally implement its final offer and its erroneous view that the ensuing strike was an economic strike. Under those circumstances, I do not find that Respondent's misconduct was so widespread that a notice reading is necessary. The standard remedies that I have ordered will accomplish the goal of ensuring employees that they may exercise their

Section 7 rights free of coercion and that Respondent and its managers are bound by the requirements of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[60]

ORDER

Respondent, Hood River Distillers, Inc., Hood River, Oregon, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling unfair labor practice strikers that they could be permanently replaced while they are on strike.

(b) Telling unfair labor practice strikers that they have been permanently replaced.

(c) Permanently replacing, and thereby discharging, unfair labor practice strikers while they are on strike.

(d) Failing and refusing to immediately reinstate unfair labor practice strikers after they make an unconditional offer to return to work.

(e) Discharging employees because they engage in union and/or protected concerted activities.

(f) Unilaterally changing terms and conditions of employment without the Union's consent and in the absence of a good-faith impasse.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days from the date of this Order, offer full and immediate reinstatement to unfair labor practice strikers to their former jobs or, if those no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, discharging, if necessary, any replacements hired on or after May 6, 2020. (The former unfair labor practice strikers are: Kelli Bell; Susan G. Bell; James Brown; Aron Butler; Jorge Caldera; Jason Cameron; Maria R. Elisea; Roshanda Halliday; Joshua M. Harbert; Ulises Hernandez-Beltran; Kelly L. Holmes; Angelica Lara; Disenia Lara; Eliseo Lara-Aguila; Britt O. Lee; Michele M. Leonard; Nick Malone; Ismael Marquez; Tracey Morrison; Mark A. Nelson;

[60] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Wendell M. Russell; Isaac O. Sosa; Jose M. Verduzco; Jaime Viramontes; and Matthew Webber.)

(b) Make whole all unfair labor practice strikers who were discharged on July 30, 2020, for any loss of earnings or benefits they may have suffered as a result of the discrimination against them, plus daily compounded interest, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any references to the unlawful decisions to discharge Ismael Marquez and Jaime Viramontes and, within 3 days thereafter, notify them in writing that this has been done and that the unlawful decisions will not be used against them in any way.

(d) On request of the Union, restore, honor and continue the terms of the collective-bargaining agreement that expired on February 28, 2019, with the following bargaining unit at Respondent's production/warehouse facility in Hood River, Oregon until the parties agree to a new contract or bargaining leads to a good-faith impasse:

> All employees, excluding office and clerical employees, casual employees hired for no more than thirty (30) calendar days and supervisors as defined in the Labor Management Relations Act.

(e) Make employees in the bargaining unit whole for any and all loss of wages and other benefits incurred as a result of Respondent's unlawful unilateral changes to terms and conditions of employment (on about May 1 and September 18, 2020), with interest, as provided for in the remedy section of this decision.

(f) Make contributions, including any amounts due, to any funds identified in the collective-bargaining agreement that expired on February 28, 2019, which Respondent would have paid but for the unlawful unilateral changes, as provided for in the remedy section of this decision.

(g) Compensate bargaining unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 19, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a report allocating the backpay awards to the appropriate calendar year(s) and a copy of each backpay recipient's corresponding W–2 forms reflecting the backpay award.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its facility in Hood River, Oregon, a copy of the attached notice marked "Appendix A."[61] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 1, 2020.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that Case 19–RD–271944 is hereby severed from Cases 19–CA–260013, 19–CA–265595, 19–CA–267920, 19–CA–268290, and 19–CA–264083 and remanded to the Regional Director for Region 19. As stated in this decision regarding the mail ballot representation election that concluded on April 20, 2021, I recommend that the Union's objection to the election be sustained and that the decertification petition be dismissed because Hood River Distillers engaged in unfair labor practices that affected the results of the election. I further recommend, in the alternative, that the Union's challenges to 24 ballots be sustained and Respondent's challenges to 3 ballots be overruled, and that in light of those rulings the parties be notified that the Union has prevailed in the election.

Dated, Washington, D.C., December 10, 2021.

Geoffrey Carter
Administrative Law Judge

[61] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID–19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if Respondent customarily communicates with its employees by electronic means.

If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX A

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT tell unfair labor practice strikers that they could be permanently replaced while they are on strike.

WE WILL NOT tell unfair labor practice strikers that they have been permanently replaced.

WE WILL NOT permanently replace, and thereby discharge, unfair labor practice strikers while they are on strike.

WE WILL NOT fail and refuse to immediately reinstate unfair labor practice strikers after they make an unconditional offer to return to work.

WE WILL NOT discharge employees because they engage in union and/or protected concerted activities.

WE WILL NOT unilaterally change terms and conditions of employment without the Union's consent and in the absence of a good-faith impasse.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer full and immediate reinstatement to unfair labor practice strikers to their former jobs or, if those no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and WE WILL discharge, if necessary, any replacements hired on or after May 6, 2020.

WE WILL make whole all unfair labor practice strikers who were discharged on July 30, 2020, for any loss of earnings or benefits they may have suffered, plus daily compounded interest, and

WE WILL also make them whole for reasonable search-for-work and interim employment expenses, plus daily compounded interest.

WE WILL remove from our files any references to the unlawful decisions to discharge Ismael Marquez and Jaime Viramontes and, within 3 days thereafter, notify them in writing that this has been done and that the unlawful decisions will not be used against them in any way.

WE WILL, on request of Teamsters Local Union No. 670, restore, honor and continue the terms of the collective-bargaining agreement that expired on February 28, 2019 for the following bargaining unit at our production/warehouse facility in Hood River, Oregon until the parties agree to a new contract or bargaining leads to a good-faith impasse:

> All employees, excluding office and clerical employees, casual employees hired for no more than thirty (30) calendar days and supervisors as defined in the Labor Management Relations Act.

WE WILL make employees in the bargaining unit whole for any and all loss of wages and other benefits incurred as a result of our unlawful unilateral changes to terms and conditions of employment (on about May 1 and September 18, 2020), with daily compounded interest.

WE WILL make contributions, including any amounts due, to any funds identified in the collective-bargaining agreement that expired on February 28, 2019, which we would have paid but for the unlawful unilateral changes.

WE WILL compensate bargaining unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 19, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a report allocating the backpay awards to the appropriate calendar year(s) for each employee and a copy of each backpay recipient's corresponding W–2 forms reflecting the backpay award.

HOOD RIVER DISTILLERS, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov

915 2nd Avenue, Room 2948, Seattle, WA 98174-1078

(206) 220-6300, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/19-CA-260013 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (206) 220-6340.

APPENDIX B
Corrections to Transcript
Hood River Distillers, 19–CA–260013, et al.

Transcript Page:Line	Transcript Correction
54:19	Ms. Botero was the speaker
167:14	"invidious" should be "individual"
169:5	"MJ (phonetic)" should be "10(j)"
238:10	"wee" should be "see"
254:24	"complaint" should be "complete"
258:7	"market" should be "bargain"
268:20	"9th" should be "19th"
277:14	"progressive" should be "regressive"
283:8	"aggressive" should be "regressive"
401:3	"axis" should be "access"
477:4	"plan" should be "plant"
528:23	"wait" should be "waive"
549:23	"would" should be "wouldn't"
560:18	Mr. Westlind was the speaker
563:16	"marketing" should be "bargaining"
642:23	"OPEC" should be "OPET"
699:3	"perception" should be "reception"
775:4	"disciple" should be "discipline"
823:14	"Trier Appointed" should be "Charging Party"
837:5	"a spider" should be "fire"
838:1	"session (sic)" should be "recession"
842:1	"employee" should be "employer"
847:14	"HRV" should be "HRD"
858:17	Mr. Williams was the speaker for the first sentence
887:3-4	"plant" should be "plan"
889:21	"aggressive" should be "regressive"
914:6	"CA" should be "TA"
975:5	"mansions" should be "main entrance"
1122:15	"here" should be "hear"
1251:24	"I want" should be "I don't want"
1263:2	"plat" should be "plant"
1286:13	"cabin" should be "cabined"
1291:8	"call route" should be "carve out"
1300:3	Mr. Barish was the speaker
1300:15	"substance of peace" should be "substantive piece"
1420:23	"floor" should be "four"
1477:8	"like" should be "didn't like"
1518:1	"forward" should be "four work"
1550:4	"13th" should be "30th"
1686:1	"not" should be "now"
1724:17	"his" should be "this"

Transcript Page:Line	Transcript Correction
1759:3	“15” should be “50”
1860:15	“I can go and reject it as exhibits filed” should be “and can go in the rejected exhibits file”
1860:22	“employers” should be “employees”
1862:4	“the OP (phonetic)” should be “a ULP”
1992:12	“PA (phonetic)” should be “TA”
2024:22	“modeling” should be “bottling”
2085:2	“Be calling” should be “Recalling”
2154:24	“our” should be “R”
2167:9	“Position” should be “Petition”
2171:14	“by 13 ‘21” should be “5/13/21”
2192:11	“have me” should be “and need”
2242:19	“employ” should be “apply”
2260:12	“Unit” should be “Union”
2290:10	“still to” should be “still need to”
2311:10	“are” should be “aren’t”
2322:8	“aggressive” should be “regressive”
2322:12	“aggressive borrowing” should be “regressive bargaining”
2330:25	“contact” should be “contract”
2342:8	“OT” should be “to”
2401:10-11	“proposed trial” should be “for posttrial”
2405:5	“failing” should be “prevailing”